VOLUME III

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 488

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHICAGO STOCK YARDS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 23, 1942
CERTIORARI GRANTED DECEMBER 7, 1942

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3730.

CHICAGO STOCK YARDS COMPANY,

PETITIONER FOR REVIEW,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS.
DECISION, MARCH 29, 1941.

RECORD ON PETITION FOR REVIEW.

VOLUME III.

Pages 901 to 1261, inclusive.

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BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK
1942.

TABLE OF CONTENTS.

Vol. CXIII. Pages 1 to 574, inclusive.

	PAGE
Court, Circuit Court of Appeals, and Title of Case	1
Record on Petition for Review:	
Docket Entries, Board of Tax Appeals	2
Petition	8
Exhibit A, Notice of Deficiency	27
Answer	35
Motion to amend Petition, granted	36
Amendment to Petition	36
Answer to Amendment to Petition	40
Stipulation of Facts	41
Proceedings before the Board	72
Petitioner's Statement of the Case	74
Respondent's Statement of the Case	121
Evidence for Petitioner:	
Testimony of Alastair G. Leonard	130
O. T. Henkle	159
John W. Austin	223
Richard Hackett	231
David H. Reimers	260
James A. McDonough	286
James F. Donovan	314
Frederick H. Prince	364
James F. Donovan, recalled	370
Carman G. Blough	394
Lawrence E. Green	479
Elisha Walker	498

TABLE OF CONTENTS

VOLUME II. Pages 573 to 900, inclusive.

Record on Petition for Review:

	PAGE
Proceedings before the Board	
Evidence for Respondent	
Testimony of Norman Merriman	573
Paul M. Atkins	711
John L. Fletcher	755
Paul M. Atkins (recalled)	764
Norman Merriman (recalled)	811
Paul M. Atkins (recalled)	819
David Friday	824
Evidence for Petitioner	
Testimony of James F. Donovan (recalled)	863

TABLE OF CONTENTS.

Volume III, Pages 901 to 1261, inclusive.

	PAGE
Findings of Fact and Opinion	901
Dissenting Opinion	951
Order amending Findings of Fact and Opinion	957
Computation for Entry of Decision	957
Motion to Modify Findings of Fact, etc.	961
Motion for Further Hearing	976
Motion for Rehearing	978
Affidavit of James A. McDonough	980
Forty-ninth Annual Report	991
Proceedings before the Board — Hearing on Motions, etc.	996
Motion for Further Hearing	1084
Further Affidavit of James A. McDonough	1084
Order denying Further Hearing	1090
Memorandum of Board of Tax Appeals on Order	1091
Proceedings before the Board — Hearing on Motions, etc.	1095
Order supplementing Findings of Fact	1202
Order for Recomputations of Deficiencies	1203
Motion for Special Rule	1203
Petitioner's Computation	1205
Order denying Motion for Special Rule, etc.	1211
Proceedings before the Board — Hearing on Computations	1213
Decision	1237
Memorandum	1238
Motion to fix Sum of Bond	1240
Order fixing Amount of Bond	1240
Petition for Review	1241
Certificate of Clerk of Board of Tax Appeals	1243
Enlargement of time for docketing case	1243
Notice of Filing Petition for Review	1244
Statement of Points	1245
Designation of Contents of Record on Review	1257
Order for Transmission of Exhibits in lieu of Printing	1258
Stipulation as to Contents of Record on Review	1258

TABLE OF CONTENTS

VOLUME IV.—Pages 1263 to 1300, exclusive

	PAGE
Proceedings in U. S. C. C. A. First Circuit	1263
Order re original exhibits	1263
Order amending statement of points	1263
Minute entry of hearing	1264
Opinion, Magruder, J.	1265
Final decree	1298
Recital as to issuance of mandate	1298
Clerk's certificate	1298
Order allowing certiorari	1300

UNITED STATES BOARD OF TAX APPEALS

CHICAGO STOCK YARDS COMPANY, PETITIONER, *v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

[COPIES SERVED ON BOTH PARTIES.]

[Docket No. 87797. Promulgated March 20, 1940.]

The petitioner is a holding or investment company which had on December 31, 1929, a surplus of $19,615,905.69 and a capital surplus of $6,450 over and above its liabilities and a paid-in capital of $1,000,000. *Held*, that the petitioner had no need for the accumulation of gains and profits beyond the amount accumulated to December 31, 1929, and a further accumulation of profits in subsequent years was beyond the reasonable needs of the business, and that during the years 1930, 1932, and 1933 the petitioner was "availed of" for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, within the meaning of section 104 of the Revenue Acts of 1928 and 1932.

JOSEPH N. WELCH, ESQ., EDWARD J. KEELAN, JR., ESQ., LAWRENCE E. GREEN, ESQ., JOSEPH K. MOYER, ESQ., and FRANCIS B. KEENEY, ESQ., for the petitioner.

PHILIP M. CLARK, ESQ., and STANLEY B. PIERSON, ESQ., for the respondent.

The respondent has determined deficiences of $1,817,686.10, $1,301,638.97, and $1,147,111.92 in petitioner's income taxes for the years 1930, 1932, and 1933, respectively. All issues have been settled by stipulation except one arising from respondent's determination that petitioner is subject to tax under section 104 of the Revenue Acts of 1928 and 1932.

Findings of Fact.

1. The petitioner is a corporation, organized under Maine law on September 26, 1911, in pursuance of a plan dated June 30, 1911, in the form of an agreement between a committee acting on behalf of the petitioner, if and when formed, and the holders of the common stock of the Chicago Junction Railways & Union Stock Yards Co. (hereinafter called the Jersey Co.). The powers of the petitioner, as stated in its charter, include the carrying on of many kinds of active business, including the purchase and lease of real estate, the holding of stocks and bonds of other corporations, the guaranteeing of obligations of others, and the carrying on of any other business which might seem to the company convenient to enhance the value of its properties.

2. The Union Stock Yards & Transit Co. of Chicago (hereinafter called the Transit Co.) is a corporation, organized under special act of the Illinois Legislature on February 13, 1865. From 1911 through 1933 it had issued and outstanding 132,000 shares of common stock of a par value of $100 per share. Under its charter it has power to operate stockyards and a belt line railroad and to borrow money to an amount not in excess of $500,000. It has continued to operate the stockyards to the present date. On January 1, 1930, it had outstanding debenture notes in the amount of $500,000, which were paid off in that year, and it did not have any outstanding bond or note obligations thereafter. During the years 1911-1913 more than 98 percent of the capital stock of the Transit Co. was owned by the Jersey Co., and since December 31, 1913, the Transit Co. has been wholly owned by the Jersey Co.

3. The Jersey Co. is a corporation, organized under New Jersey law on July 10, 1890, for a period of 50 years. It was formed at a time when the meat packers having plants in Chicago west of the stockyards, known as Packingtown,

had instituted suits to compel the railroads to switch their freight without charge and to have the stockyards declared a nuisance, and had threatened to move to Indiana, where they had purchased and developed a tract of land at a cost of about $1,000,000. At all times the authorized and issued capital stock of the Jersey Co. has consisted of 65,000 shares of preferred stock of $100 par value and 65,000 shares of common stock of $100 par value, a share of each class being entitled to one vote. On July 10, 1890, the Jersey Co. issued $10,000,000 5 percent collateral trust gold bonds due July 1, 1915, and on July 15, 1892, it entered into an agreement with certain packers whereby the Jersey Co. agreed to and did pay $3,000,000 in 5 percent bonds due July 1, 1907, and the packers agreed to and did continue to keep their businesses in Packingtown for 15 years from July 1, 1891. Similar arrangements with other packers were also made in the years 1892-1901, for periods of from 5 to 20 years, the Jersey Co. paying in all $4,665,000 in cash and bonds and other property to the packers. In 1909 the issuance of $14,000,000 new 40-year 4 percent bonds was authorized, $4,000,000 of which were issued. In 1915 the remaining $10,000,000 were issued to retire the $10,000,000 5 percent bonds which matured in that year. Owing to the high rates of interest at which money was loaning at the time, the new issue carried an interest rate of 5 percent.

4. The Chicago Junction Railway Co. (hereinafter called the Railway Co.) is a corporation, organized under Illinois law on April 26, 1898, as a consolidation of two corporations which were wholly owned by the Jersey Co. One of these was the Chicago Hammond & Western Railroad Co., which owned a belt line railroad (known as the "Outer Belt") in Chicago and its vicinity. The other was the Chicago & Indiana State Line Railway Co., which operated another

belt line railroad (known as the "Inner Belt") in the same vicinity, directly serving the Chicago stockyards under lease from the Transit Co. dated December 15, 1897. The Railway Co. had an authorized and issued capital stock of $2,200,000, divided into 22,000 shares of $100 par value, until 1913, when 33,000 additional shares were issued as a stock dividend to the Jersey Co. The Railway Co. has been at all times wholly owned by the Jersey Co. During the years 1930-1933 the Railway Co. had no outstanding indebtedness. The "Outer Belt" line was sold in 1907.

On December 1, 1913, the Transit Co. leased its "Inner Belt" line to the Railway Co. at an annual rental of $600,000, and on May 19, 1922, the Transit Co. and the Railway Co. entered into a lease under which the "Inner Belt" line was leased by them to the Chicago River & Indiana Railroad Co., wholly owned by the New York Central Railroad Co., for 99 years at a rental, guaranteed by the New York Central, of $1,500,000 for the first year and $2,000,000 for each year thereafter, the lessee to pay all maintenance charges and taxes. On May 16, 1922, the Interstate Commerce Commission authorized the lease, subject to the conditions, among others, that nothing should be construed as a finding that the rental was just and reasonable and that any person having an interest in the subject matter might at any future time make application for such modification of the conditions as might be required in the public interest. Jurisdiction was retained to reopen the proceeding on the Commission's own motion for the same purpose. The application of the New York Central for authority to buy the Railway Co. properties under an option given with the lease was denied, without prejudice to future proceedings.

5. The Chicago Junction Railroad Co. (hereinafter called the Elevated Co.) is a corporation, organized under Illinois law on November 20, 1902, for the purpose of provid-

ing elevated passenger service through Packingtown. It was created after the city of Chicago had passed an ordinance requiring that all the railroad tracks in Chicago be elevated and after the Transit Co. had elevated its freight tracks. On September 30, 1903, the Elevated Co. leased its properties to the South Side Elevated Railroad Co., which connected with lines running all through Chicago, and on March 1, 1905, the Elevated Co. issued $2,327,000 first mortgage 4 percent 40-year gold bonds, due March 1, 1945, and guaranteed by the Jersey Co. The rental was the payment of taxes and interest on the Elevated Co. bonds. During the years 1930-1933 the Elevated Co. had outstanding capital stock of $50,000, which has been at all times wholly owned by the Jersey Co.

6. The Stock Yards Harness & Saddlery Co. (hereinafter called the Harness & Saddlery Co.) is a corporation, organized in Illinois in 1903. It is a small company and has continually been wholly owned by the Transit Co.

7. Central Manufacturing District (hereinafter called the District) is a real estate trust with transferable shares, created by the transfer to trustees on May 2, 1902, of real estate northwest of and adjacent to the stockyards, the Jersey Co. being the sole beneficiary. This real estate and another tract later acquired were vacant land which was acquired and used for development into a manufacturing district to provide additional tonnage for the "Inner Belt" line. The District has its own streets and police, water, lighting, and sewerage facilities. The District constructs buildings for lessees, the petitioner assisting in financing if the District does not have sufficient funds. The District had outstanding bonds of $2,915,000 in 1930, $2,700,000 in 1931, $2,475,000 in 1932, and $2,250,000 in 1933. These bonds were guaranteed by the Jersey Co.

8. The Produce Terminal Corporation (hereinafter

called Produce Terminal) is a corporation which was organized under Illinois law on March 4, 1915, pursuant to an order of the Illinois Commerce Commission to carry on the business of supplying electric light and power to the Chicago stockyards, this having been formerly done by the Transit Co. During the years 1930-1933 Produce Terminal's capital stock was $2,000,000, consisting of 20,000 shares, of which 7,170 shares were issued in 1927 as a stock dividend to petitioner. Produce Terminal was wholly owned by the Transit Co. from the date of its formation until 1924, when all its shares were distributed by the Transit Co. to the Jersey Co. as a dividend. On December 31, 1926, the Jersey Co. distributed those shares to the petitioner as a dividend and Produce Terminal has since been wholly owned by the petitioner. Although this stock was entered on the petitioner's books at a value of $499,031.29, its value when distributed was actually $1,032,431.95.

9. When the Jersey Co.'s 1892 contracts with the packers came to an end in 1907 the packers asked for a further share in the profits of the stockyards, and after efforts of F. H. Prince, a stockholder of the Jersey Co., Armour,[1] one of the packers, became a shareholder of the petitioner, the packers then continuing to do business at the stockyards.

10. Under the plan for the formation of the petitioner dated June 30, 1911, the common stockholders of the Jersey Co. were offered the guaranty of the petitioner, by way of stamp on their stock certificates, of 8% annual dividends or the privilege of exchanging their shares at the rate of one share for $200 face amount of 50-year 5 percent collateral trust bonds of the petitioner.

On September 27, 1911, the petitioner agreed with Frank

[1] There are several places in the record where it is not clear whether the individual J. Ogden Armour is meant or the corporation Armour & Co. Since for present purposes the distinction has no importance the name Armour is used equivocally to apply to either.

R. Pegram, as agent for Prince, to buy from him the plan and the assents of more than 60,000 common shares of the Jersey Co., plus $1,000,000 in cash, for $8,000,000 par value of the petitioner's capital stock. On the same day the petitioner agreed with the Jersey Co. common stockholders to pay holders of stamped certificates a 2¼ percent quarterly dividend, to stamp certificates, upon presentation, with the guaranty of the petitioner, that the guaranteed shareholders sold all their rights to dividends upon the guaranteed shares, that all dividends on such shares were to be used first to pay the 9 percent guaranteed dividends, the residue to be retained by the petitioner, the petitioner to secure its 5 percent bonds by unstamped Jersey Co. $100 common stock for each $200 face amount of bonds or by shares of Jersey Co. $100 preferred stock for each $120 face amount of bonds, and that the petitioner might withdraw the right of exchange on 30 days' notice. Also on September 27, 1911, the petitioner issued $1,000,000 par value of its capital stock for $1,000,000 cash.

On October 2, 1911, the petitioner executed a trust indenture providing for the issuance of $13,000,000 5 percent 50-year callable gold bonds, secured by all the Jersey Co. common shares owned or thereafter acquired by it; it was required to do whatever might be necessary to maintain or preserve the corporate existence of the Jersey Co., but not to prevent the consolidation or merger of the Jersey Co. with, or the sale, or transfer of its property to, the petitioner.

11. On November 11, 1911, the petitioner's capital stock was increased from $1,000,000 to $8,000,000, divided into 80,000 shares of common stock, and on March 21, 1912, $7,000,000 of its stock was issued in payment of the plan of

the owner of 64,480 shares and Armour was owner of the remaining 15,520 shares.

12. By August 31, 1914, the petitioner had acquired in exchange for its bonds 31,079 Jersey Co. common shares and 33,922 shares had been stamped with the guaranty; in July 1919 it acquired the remaining three shares.

13. On October 1, 1914, the petitioner and the Jersey Co. made an agreement whereby the petitioner guaranteed the interest upon the Jersey Co.'s bonds; promised to fulfill all obligations of the Jersey Co. under the deeds of trust, except the payment of principal of the bonds; guaranteed all payments the Jersey Co. might be required to make by virtue of its guaranty of interest, but not of principal of $2,327,000 bonds of the Elevated Co., and guaranteed 6 percent dividends on the Jersey Co. preferred stock and 9 percent dividends on whatever Jersey Co. common stock the petitioner had not acquired. The Jersey Co. assigned to the petitioner all of its right to dividends thereafter declared or distributable by the Transit Co. and the Railway Co. and directed those companies to pay certain specified amounts of interest on the Jersey Co. bonds, and dividends on the Jersey Co. preferred stock and such common stock as the petitioner had not acquired, and to pay any surplus to the petitioner upon its request. The Jersey Co. promised to direct the Railway Co. to apply $600,000 annual rent payable by the Railway Co. to the Transit Co. under the lease of the latter's properties to interest on the Jersey Co.'s bonds, and to use its own income first to pay its own expenses and taxes, and then to pay the surplus to the petitioner upon its request.

14. On October 15, 1921, the petitioner issued to F. H. Prince & Co., an enterprise engaged until 1931 in the brokerage and banking business, with seats on the New York, Boston, and Chicago Stock Exchanges, entirely owned by

F. H. Prince, $1,500,000 face value 10-year 7 percent serial debentures in partial payment at par of a debt then owed by the petitioner to F. H. Prince & Co. On June 1, 1922, the petitioner issued $2,000,000 face value 10-year 7 percent serial debentures, of which $1,500,000 were used to retire the issue of October 15, 1921, and the remaining $500,000 were issued to F. H. Prince & Co. in partial payment at par of a debt then owed by the petitioner to F. H. Prince & Co. In December 1922 the $2,000,000 face value of bonds dated June 1, 1922, were reacquired by the petitioner for $1,860,000, and were set up on its balance sheet in that year as treasury bonds in the amount of $1,860,000. By the end of 1933 the petitioner had reacquired $3,642,000 face value of its own 5 percent bonds for $3,165,286.14 cash.

15. On February 27, 1920, Armour, holding 15,520 of the petitioner's 80,000 outstanding common shares, was ordered by a consent decree in the so-called Packers Case to dispose of them. On November 2, 1920, Armour and Prince agreed that Armour should receive preferred stock of the petitioner in exchange for the 15,520 common shares, and, with the court's approval dated February 24, 1921, Armour retained in the earnings and assets of the District and Produce Terminal the same proportionate interest as it had as owner of the 15,520 common shares, and Prince bought the 15,520 shares in June 1922 for $1,500,000, thus becoming the sole owner of the petitioner's common stock. Armour received from Prince $300,000 in cash and $2,000,000 in bonds of the petitioner which Prince had received from F. H. Prince & Co. Under an agreement dated May 11, 1922, between the petitioner and the Central Manufacturing District Co., a Delaware corporation with an authorized capital of 8,000 no par shares,[2] and an agreement dated June 2, 1922, between Prince, Armour, and the peti-

[2] This corporation is not the real estate trust herein called the District

tioner, 6,448 Central Manufacturing District Co. shares were issued to the petitioner and 1,552 shares to Armour in partial payment for the 15,520 shares of petitioner purchased by Prince. Under the agreement of May 11, 1922, the petitioner assigned to the Central Manufacturing District Co. all its rights in respect of dividends and liquidation distributions made by the District and by Produce Terminal. The petitioner in 1925 purchased the 1,552 shares of Central Manufacturing District Co. from Armour for $500,000 and in 1930 sold them for $26.92, and charged off the balance.

16. On June 1, 1932, F. H. Prince & Co., Inc., was organized under the laws of Maine, and its entire capital stock of 20,000 shares was issued for 48,000 common shares of the petitioner owned by Prince. On June 3, 1932, Prince transferred to himself and his wife as trustees under a deed of trust, of which his relatives and friends were the beneficiaries, the 20,000 shares of F. H. Prince & Co., Inc., and since that date Prince has owned no stock in that company and the trustees have been the sole stockholders. From December 19, 1932, to December 31, 1933, the following persons were officers and directors of F. H. Prince & Co., Inc.: F. H. Prince, president and director; F. H. Prince, Jr., vice president and director; James A. McDonough, secretary-treasurer and director; John F. Dana, clerk; Abbie Norman Prince, director; Frank R. Pegram, director.

17. Throughout the years 1929-1933 the Jersey Co. owned all the capital stock of the Transit Co. (which owned the Harness & Saddlery Co.), the Railway Co., and the Elevated Co., and all the shares of beneficial interest in the District. During this period, under a mortgage and deed of trust dated April 10, 1900, and a supplemental mortgage and deed of trust dated April 1, 1915, the Jersey Co. had outstanding $14,000,000 face value of its noncallable bonds

maturing April 1, 1940, of which $10,000,000 bore interest at 5 percent, and $4,000,000 at 4 percent and, as collateral security for these bonds, had pledged 131,083 of the 132,000 outstanding shares of the Transit Co., 54,991 of the 55,000 outstanding shares of the Railway Co., and $2,500,000 face value bonds of the Indiana Harbor Belt Railway Co., maturing in 1957 and guaranteed by the Lake Shore & Michigan Southern Ry. Co., and Michigan Central R. R. Co.

18. During 1929 the Transit Co. had outstanding $500,000 face value debenture notes which matured in 1930, and throughout the years 1929-1933 the Elevated Co. had outstanding $2,327,000 of first mortgage 4 percent bonds issued March 1, 1905, maturing in 1945, and guaranteed by the Jersey Co.

19. On December 31, 1929, the District had outstanding $3,909,000 of bonds bearing interest at different rates between 5 and 6 percent, guaranteed by the Jersey Co., and maturing on March 1 of each year until 1941 as follows:

1930	$994,000	1939	$295,000
1931	215,000	1940	185,000
1932-1938 (each year)	225,000	1941	735,000

On June 6, 1931, the District became the owner of all of the capital stock of two Illinois corporations; the Central Storage Corporation and the Central Storage & Forwarding Corporation; the former was merged into the latter on December 31, 1931, and the District has since been the sole owner of the surviving corporation.

20. On October 29, 1931, the Pau Corporation was organized under Illinois law, with a capital stock of $5,000. F. H. Prince & Co. was and is the sole stockholder. The Pau Corporation was formed to take over the easements covering the properties served with light and power by Producer Terminal. With money loaned to it by the peti-

tioner, the Pau Corporation purchased machinery which was installed in the plant of Produce Terminal. The petitioner received no interest upon the loans.

21. Western Associates, Inc., a corporation wholly owned by the petitioner, was organized in January 1933 under Delaware law to enable the petitioner to hold the shares of the Stock Yards Bank & Trust Co., which was formed on January 1, 1933, as a consolidation of the Stock Yards National Bank and the Stock Yards Trust & Savings Bank, and later to hold the shares of the Live Stock National Bank of Chicago. It received $1,500,000 from the petitioner on the issue of its 40,000 shares of capital stock and immediately paid it to the Stock Yards Bank & Trust Co., a bank organized under Illinois law and located in the stockyards district of Chicago, for 40,000 shares of that corporation's capital stock. In April 1933 the Stock Yards Bank & Trust Co. was reorganized, and Western Associates, Inc., received in exchange for the shares of that bank 40,000 shares of the capital stock of the resulting Live Stock National Bank of Chicago. Western Associates, Inc., has owned these shares since that time.

22. On December 31, 1929, the structure of the Chicago stockyards enterprise was as follows:

A. The petitioner, upon a paid-in cash capital of $1,000,000, had an earned surplus of $19,615,905.69 and a capital surplus of $6,450. It owned all of the capital stock of Produce Terminal, carried at a value of $1,032,431.95, and Central Manufacturing District Co., carried at a cost of $506,448; 58,742 Jersey Co. common shares out of 65,000 outstanding, carried at a cost of $10,993,551.74; and 457 Jersey Co. preferred shares out of 65,000 outstanding, carried at a cost of $45,821.50. The Produce Terminal was a prosperous corporation. It had net earnings of $262,213.73 for 1929 and annual average earnings of $172,517.68 for

the five-year period ended with 1929. It paid dividends to the petitioner from 1928 to 1933, inclusive, at the rate of $200,000 per annum. Its excess of assets over liabilities at December 31, 1929, was $2,552,017.05, although carried on the petitioner's books at a value of $1,032,431.95.

The petitioner had outstanding at December 31, 1929, 5 percent bonds in the amount of $3,227,000. Its excess of assets over all liabilities, including its capital stock on that date, was $19,622,355.69.

B. The Jersey Co. owned all the shares of capital stock of the Transit Co., the Railway Co., the Elevated Co., and the beneficial interest of the District. It filed a consolidated return for 1929, which included the operations of the above named wholly owned subsidiaries (including therein the operations of the Harness & Saddlery Co., a subsidiary of the Transit Co.) and showed a net income of $2,835,382.71 for the entire group. The group had outstanding bonds and debenture notes as follows:

Jersey Co. 5% bonds maturing 4-1-40	$10,000,000
Jersey Co. 4% bonds maturing 4-1-40	4,000,000
Elevated 4% bonds maturing 3-1-45	2,327,000
District bonds maturing at various dates	3,909,000
Transit Co. debenture notes maturing 1930	500,000
Total	20,736,000
Net consolidated assets	$73,322,871.58
Net consolidated liabilities	33,191,175.08
Excess of assets	40,131,696.50

C. Against the total bonded indebtedness of $23,963,000 standing against the entire group of companies, were the following liquid assets:

Petitioner	
Cash	$6,689,304.20
Accounts receivable	252,447.08
Notes receivable (Prince)	3,104,400.00
District 6's 1930	27,000.00
District 5's	55,733.00
Transit Co. 5½'s	15,022.50
Other investments	1,467,338.35
Produce Terminal	
Cash	499,575.93
Total	12,110,821.12
Jersey Co. and subsidiaries [1]	9,594,363.94
Total	21,705,185.06

[1] Includes impounded charges of $2,013,523.34 which were not released to the Transit Co. until 1932.

In addition to the above, the petitioner and the Jersey Co. and its subsidiaries owned fixed and other assets of a book value of approximately $40,000,000.

23. During the years 1930, 1931, 1932, and 1933 the petitioner, the Jersey Co., and some of that company's subsidiaries had large deposits in banks in the stockyards district or its vicinity. The petitioner and some of the subsidiaries of the Jersey Co. owned shares of stock in such banks. If the banks failed the depositors stood to lose a large part of their deposits and the stockholders might be subject to a 100 percent assessment upon their stock. Prince believed that it was necessary to protect these banks. He was particularly interested in maintaining the solvency of the Stock Yards National Bank, which was known throughout the country as the Stock Yards Bank. The failure of that bank would be a serious blow to the Jersey Co. and its subsidiaries.

In order to assist the banks the Transit Co. in 1930 paid $464,000 for shares of capital stock of Stock Yards National

Bank and purchased real estate bonds from the Stock Yards Trust & Savings Bank for $100,000.

In 1931 Produce Terminal purchased from the Central Manufacturing District Bank real estate bonds for $490,000 cash. In 1932 the petitioner purchased notes of individuals and corporations from the Central Manufacturing District Bank, paying therefor $501,439.58. These were carried in its balance sheet at December 31, 1932, at a value of $327,307.55. The petitioner loaned $3,071,779.19 to the Stock Yards National Bank and the Stock Yards Trust & Savings Bank. The Transit Co. during this year purchased debentures of the Stock Yards Investment Co., an affiliate of the Stock Yards National Bank, for $1,340,000 and Produce Terminal purchased similar debentures for $350,000.

In 1933 the Transit Co. loaned to the Stock Yards Bank & Trust Co. $1,016,414.84 in Government bonds. This loan became a loss to the Transit Co. in 1933. The banks needing further assistance, the petitioner agreed to subordinate $1,800,000 of its deposits in the Live Stock National Bank to the claims of other depositors. The Transit Co., Produce Terminal, and District likewise subordinated deposits in the amounts of $1,300,000, $300,000, and $600,000, respectively. The subordinated deposits were to be paid only out of certain assets which the bank was not allowed by the bank examiners to treat as good assets. The agreement for the subordination of the deposits was that the repayment would be made by the bank out of recoveries from unacceptable assets which were written off on the books of the bank, such recoveries to be applied, in the first instance, to the amounts subordinated by the petitioner.

24. At the end of each year from 1911 to 1921, inclusive, Prince [3] was indebted to the petitioner upon cash borrowed

[3] The name Prince is hereinafter sometimes used to include F. H. Prince & Co., the name under which he conducted his brokerage business.

from it. His indebtedness at the end of 1911 amounted to $300,000. This amount steadily increased up to 1921 when the amount was $760,000. The loans of cash and of securities by the petitioner to Prince at the end of each year from 1922 to 1933, inclusive, were as follows:

Year	Cash	Securities	
		Bonds Petitioner and United States Treasury	Stock New Jersey Co. common shares
1922	$ 760,000.00	$160,000	16,855
1923	785,000.00	160,500	16,855
1924	760,000.00	164,000	15,355
1925	760,000.00	172,000	15,365
1926	947,867.08	172,000	14,755
1927	1,600,000.00	150,000	11,000
1928	1,700,000.00	150,000	11,000
1929	3,104,400.00	150,000	6,000
1930	2,529,400.60	150,000	4,200
1931	2,619,400.00	241,000	3,400
1932	3,408,000.00	91,000	1,710
1933	4,848,000.00	41,000	1,800

From 1918 the petitioner was indebted to F. H. Prince & Co. for shares of common stock of the Jersey Co., and bonds of the petitioner acquired by it from F. H. Prince & Co. The amount owing at the end of 1918 was $3,433,694.35. The amount of the debt at the end of each year from 1922 to 1925, inclusive, was as follows:

1922	$717,001.28
1923	497,396.64
1924	269,352.26
1925	40,460.37

This indebtedness was entirely liquidated during the year 1926 and the petitioner was not thereafter indebted to either F. H. Prince or F. H. Prince & Co.

Prince's indebtedness to the petitioner and the petitioner's indebtedness to Prince have always been carried

in separate accounts. Upon the petitioner's debts to Prince it paid interest at the rate of 5 percent or more, depending upon the rate charged by E. H. Prince & Co. to other margin customers. Upon its loans to Prince the petitioner always collected interest at the rate of 4 percent per annum. Prince paid the petitioner nothing for the securities borrowed by him.

From 1912 to 1933, Prince pledged collateral with the petitioner for the cash loans advanced to him, which consisted principally of common stock of the petitioner. The fair market value of the collateral pledged at the end of each year was as follows:

1922	$397,700.00	1928	$3,620,626.00
1923	411,106.00	1929	4,786,332.50
1924	60,878.00	1930	3,673,608.00
1925	20,978.00	1931	3,769,684.25
1926	5,956.00	1932	5,541,695.20
1927	3,284,128.00	1933	8,664,199.00

The loans were used by Prince for any purpose desired by him. In 1932 the petitioner loaned Prince $160,000 for the purchase of a home in Newport, Rhode Island; also $450,000 in order to strengthen the financial statement of E. H. Prince & Co. which Prince was required to file with the New York Stock Exchange. In 1933 the petitioner loaned an additional amount of $440,000 to Prince for the same purpose and $1,000,000 to enable him to acquire shares of stock of Armour & Co. In 1933 Prince purchased Armour & Co. common A and B shares and preferred stock at a cost to him of $1,067,389.50. With this acquisition of stock of Armour & Co. Prince became chairman of the board of directors of Armour & Co.

25. The balance sheets of the petitioner for the years 1930 to 1933, inclusive, revised to reflect correct earned surplus, are as follows:

Assets	1930	1931	1932	1933
Cash	$9,628,456.77	$9,516,376.07	$7,779,716.27	$7,647,285.27
Accounts receivable	123,311.35	106,473.75	11,884.67	47,285.50
Notes receivable (District)	800,000.00	800,000.00	1,350,000.00	1,625,000.00
Other notes receivable	2,529,400.00	3,027,660.61	3,424,550.74	4,848,000.00
Interest and dividends receivable	57,477.16	66,408.20	81,053.68	77,709.25
Investments:				
New Jersey Co. common	11,036,509.99	11,136,383.49	11,193,549.19	11,241,352.19
New Jersey Co. preferred	64,935.00	124,844.25	150,823.28	218,933.33
District 5's	48,703.00	46,693.00	40,667.00	30,747.00
Produce Terminal	1,032,431.95	1,032,431.95	1,032,431.95	1,032,431.95
District capital stock	506,421.08	506,421.08	506,421.08	506,421.08
Other investments	1,410,771.11	2,774,883.99	1,443,966.14	1,333,389.27
Own 5% bonds in treasury	2,818,740.89	2,862,462.89	3,156,483.64	3,165,286.14
Own 7% bonds in treasury	372,000.00	186,000.00		
Notes receivable—Pau Corporation			189,503.34	236,736.71
Western associates stock				1,500,000.00
Notes receivable taken over			327,307.55	322,801.55
Subordinated deposits				1,800,000.00
Advances to banks			3,071,779.19	
Investment account	7,000,000.00	7,000,000.00	7,000,000.00	7,000,000.00
Total	37,429,052.30	39,187,284.28	40,760,137.72	42,629,789.27
Liabilities				
5% bonds of 1961	6,260,000.00	6,260,000.00	6,260,000.00	6,262,000.00
10 year 7% bonds	400,000.00	200,000.00		
Notes and accounts payable	109.81	109.65		23,786.00
Accrued bond interest	78,250.00	78,250.00	78,250.00	78,275.00
Capital stock	8,000,000.00	8,000,000.00	8,000,000.00	8,000,000.00
Surplus	22,684,242.49	24,642,474.63	26,415,437.72	28,239,278.70
Capital surplus	6,450.00	6,450.00	6,450.00	6,450.00
Total	37,429,052.30	39,187,284.28	40,760,137.72	42,629,789.70

26. The net income of the petitioner and the dividends paid by it in the years 1911 to 1933, were as follows:

Year	Net earnings	Dividends paid	Excess of net earnings
1911 1929	$24,375,905.69	$4,760,000	$19,615,905.69
1930	3,468,336.80	400,000	2,068,336.80
1931	2,358,232.14	400,000	1,958,232.14
1932	2,172,963.09	400,000	1,772,963.09
1933	2,243,840.98	400,000	1,843,840.98
	34,619,278.70	6,360,000	28,259,278.70

27. A comparison of petitioner's balance sheets at December 31, 1929, and December 31, 1933, as corrected by stipulations filed, shows as follows:

Assets	1929	1933	Increase or (decrease)
Cash	$6,689,304.26	$7,645,235.97	$955,931.71
Cash (subordinated deposits)		1,800,000.00	1,800,000.00
Notes receivable (District)		1,625,000.00	1,625,000.00
Notes receivable (F. H. Finco)	3,194,400.00	4,848,000.00	1,743,600.00
Notes receivable (Paa Corp.)		236,536.51	236,536.51
Accounts receivable	252,447.08	45,285.50	(207,161.58)
Interest and dividends receivable	71,038.07	77,769.25	6,731.18
Investment at cost:			
Jersey Co. common[1]	10,993,551.74	11,241,352.19	247,800.45
Jersey Co. preferred[2]	45,821.00	218,933.33	173,111.83

[1] For 1929—27,442 shares at cost, $4,733,551.74, and 31,300 shares for $6,260,000 5% bonds; for 1933—29,026 shares at cost, $4,979,352.19, and 31,310 shares for $6,262,000 5% bonds.

[2] For 1929 cost of 457 shares; for 1933 cost of 2,362 shares.

Assets	1929	1933	Increase or (decrease)
Investments at cost—Continued.			
District 6's of 1930	$27,000.00		($27,000.00)
District 5's	55,733.00	$30,747.00	(24,986.00)
Transit Co. 5½'s	15,022.50		(15,022.50)
Produce Terminal (capital stock)	1,032,431.95	1,032,431.95	
District Co. (capital stock)	506,448.00	506,421.08	(26.92)
Other investments	1,467,338.35	1,333,989.27	(133,349.08)
Own 5's of 1961	2,742,178.89	3,165,286.14	423,107.25
Own 7's	558,000.00		(558,000.00)
Western Associates, Inc. (capital stock)		1,500,000.00	1,500,000.00
Notes receivable (taken from bank)		322,801.51	322,801.51
Investment account	7,000,000.00	7,000,000.00	
Total	34,360,715.34	42,629,789.70	8,069,074.36
Liabilities			
5% bonds of 1961	$6,260,000.00	$6,262,000.00	$2,000.00
10-yr. 7% bonds	600,000.00		(600,000.00)
Notes and accounts payable	109.65	23,786.00	23,676.35
Accrued bond interest	78,250.00	78,275.00	25.00
Capital stock	8,000,000.00	8,000,000.00	
Surplus	19,615,905.69	28,259,278.70	8,643,373.01
Capital surplus	6,450.00	6,450.00	
Total	34,560,715.34	42,629,789.70	8,069,074.36

The net earnings of the petitioner for the four years 1930 to 1933 were $10,243,373.01. Of these earnings $1,600,000 was paid out in dividends, $8,069,074.36 is represented by an increase in assets, and $574,298.65 was used in reduction of liabilities.

In explanation of the above balance sheets it should be noted that the asset, "Investment Account" of $7,000,000,

has no asset value at the present time. It represents the $7,000,000 of capital stock which was issued for the plan turned over to the corporation shortly after its organization in 1911. It had no fair market value at the date of its acquisition.

It should further be noted that the asset "Own 5's, of 1961" in the amount of $2,742,178.89 for 1929 represents the cost to the petitioner of $3,033,000 of its own bonds and the asset "Own 7's" in the amount of $558,000 cancels a liability of $600,000. The petitioner had no outstanding 7 percent bonds in either 1929 or 1933. If these bonds were canceled instead of being carried as treasury bonds the surplus of the corporation at December 31, 1929, would be increased in the amount of $332,821.11. Likewise, the corresponding asset of $3,165,286.14 in the balance sheet for 1933 shows the cost to the petitioner of $3,642,000 par value of 5 percent bonds. If these bonds were canceled the petitioner's liability on 5 percent bonds of 1961 would be shown as $2,620,000 and its surplus at the end of 1933 increased in the amount of $476,713.86.

28. The consolidated net income of the petitioner and the Jersey Co. and their subsidiaries in the years 1930 to 1933 were as follows:

Net Income	1930		1931		1932		1933	
Transit Co.		$1,867,913.59		$1,607,169.30		$3,617,984.99		$(827,463.49)
Less dividends		10,000.00		8,000.00		8,000.00		2,000.00
		1,857,913.59		1,599,169.30		3,609,984.99		(829,463.49)
Harness & Saddlery Co.		5,771.21		3,659.48		(1,107.77)		4,290.16
Railway Co.		1,242,627.46		1,468,683.49		1,193,618.30		1,342,138.32
Elevated Co.		(25,758.14)		(25,758.14)		(25,758.14)		(25,758.14)
Produce Terminal		341,102.08		340,796.63		372,616.30		29,850.39
Jersey Co.	$2,481,647.14		$2,441,980.87		$2,406,220.02		$2,268,079.38	
Less dividends	3,081,857.96		3,085,651.35		3,080,872.44		2,903,500.00	
		(600,210.82)		(643,670.48)		(674,652.42)		(635,420.62)
District		289,403.32		119,660.31		207,492.82		237,932.62
Central Storage & Forwarding Corp.				(41,121.97)		(87,765.63)		(5,467.26)
Central Storage Corporation				11,686.78				
Pau Corp.						7,564.81		(486.45)
Petitioner	$3,468,336.80		$2,358,232.14		$2,172,963.09		$2,243,840.98	
Less dividends	2,178,897.68		2,184,985.96		2,196,664.10		2,185,460.44	
		789,466.04		173,246.18		(23,701.01)		58,380.54
Total		4,400,287.82		3,006,357.58		4,578,292.25		185,996.07

29. The income and deductions of the petitioner in the years 1930 to 1933, as shown on its income tax returns for these years, were as follows:

Income	1930	1931	1932	1933
Interest	$546,120.45	$570,987.68	$572,055.03	$462,252.74
Profit on sales	614,047.21	16,389.50	(100,791.54)	64,164.69
Dividends	2,217,331.68	2,225,316.50	2,216,260.35	2,197,212.52
Profit on real estate		967.30		
Total income	3,377,499.31	2,813,660.98	2,687,523.84	2,723,638.95
Deductions				
Salary president	50,000.00	50,000.00	50,000.00	50,000.00
Salary, treasurer	500.00	500.00	500.00	500.00
Interest	313,256.53	313,349.34	313,000.00	313,343.57
Taxes	425.00	425.00	212.12	48,167.70
Wages	2,000.00	2,000.00	2,000.00	2,000.00
Maintenance of trust	960.00	960.00	960.00	
Commissions	690.10	680.62	680.62	
Rent	315.00	420.00	420.00	352.00
Directors' fees	90.00	90.00	120.00	90.00
Auditors	5,276.92	4,392.97		
Legal expense			50.00	15,875.52
Postage, etc.	18.74	31.69	102.67	212.92
Traveling	12.00	12.14	12.44	
Bad debt	13,385.00			
Services of trustees				1,493.03
Corp. trust				100.00
Draft expense				4.49
Error on return	0.01			
Dividends	2,217,331.68	2,225,316.50	2,216,260.35	2,197,221.52
Total deductions	2,604,321.98	2,598,378.26	2,584,367.70	2,629,361.05
Net income	773,177.36	215,282.72	98,156.14	94,277.90

The net income of the Jersey Co., the dividends paid by it, and its earned surplus on December 31 in the years 1930 to 1933 were as follows:

Year	Net income	Total dividends	Dividends to others than petitioner	Earned surplus on Dec. 31
1930	$2,481,647.14	$2,421,857.96	$443,028.75	$5,062,663.22
1931	2,441,980.87	2,425,651.35	436,872.00	5,060,554.76
1932	2,406,220.02	2,420,872.44	428,987.25	5,027,464.36
1933	2,268,079.38	2,313,500.00	425,412.00	4,903,605.76

The net income of the Transit Co., the dividends paid by it, and its earned surplus on December 31 in the years 1930 to 1933 were as follows:

Year	Net income	Dividends	Earned surplus on Dec. 31
1930	$1,867,913.59	$1,844,357.96	$5,019,956.05
1931	1,607,169.30	1,848,151.35	4,778,974.00
1932	3,617,984.99	1,843,372.44	6,262,414.55
1933	(827,463.49)	1,716,000.00	3,718,951.06

Included in the net income for 1932 was a nonrecurrent item of $2,426,433.29, consisting of impounded reweighing charges, plus interest, accumulated since 1921. In 1933 a nonrecurrent item resulting from a charge-off of securities, including real estate bonds taken over from the Stock Yards Trust & Savings Bank, capital stock of the Stock Yards National Bank, and debenture bonds of the Stock Yards Investment Co. which Government examiners had ordered taken out of the Stock Yards National Bank, caused a decrease in income in the amount of $2,204,754.77.

The net income of the Railway Co., the dividends paid by it, and its earned surplus on December 31 in the years 1930 to 1933 were as follows:

Year	Net income	Dividends	Earned surplus on Dec. 31
1930	$1,242,627.46	$1,237,500.00	$2,073,581.72
1931	1,468,683.49	1,237,500.00	2,304,765.21
1932	1,193,618.30	1,237,500.00	2,260,885.51
1933	1,352,138.32	1,187,500.00	2,425,521.83

In each of the years 1930-1933 the Elevated Co. sustained a loss of $25,758.14 and on December 31 in the years 1930-1933 it had deficits as follows:

1930	$57,361.55
1931	83,119.65
1932	108,877.83
1933	134,635.97

The net income of Produce Terminal, the dividends paid by it, and its earned surplus on December 31 in the years 1930-1933 were as follows:

Year	Net income	Dividends	Earned surplus on Dec. 31
1930	$341,102.08	$200,000	$1,039,253.66
1931	340,796.63	200,000	1,180,050.29
1932	372,616.30	200,000	1,352,666.59
1933	29,850.39	200,000	1,182,516.98

The net income of the District and its earned surplus on December 31 in the years 1930-1933 were as follows:

Year	Net income	Earned surplus on Dec. 31
1930	$289,403.32	$5,126,553.50
1931	119,666.31	5,254,553.21
1932	207,492.82	5,462,046.03
1933	237,932.62	5,699,978.65

The District has never paid a dividend.

The Central Storage Corporation had income in the amount of $11,686.78 in 1931 and paid no dividends. The Central Storage & Forwarding Corporation paid no dividends and had losses in the years 1931-1933 as follows:

1931	$41,121.97
1932	87,765.63
1933	5,467.26

On December 31, 1931, the Central Storage Corporation had a surplus of $27,526.71. The earned surplus of the Central Storage & Forwarding Corporation on December 31 was $12,432.85 in 1931 and it had deficits of $113,928.04 and $119,395.30, respectively, on December 31, 1932, and December 31, 1933.

The net income of the Harness & Saddlery Co., the dividends paid by it, and its earned surplus on December 31 in the years 1930-1933 were as follows:

Year	Net income	Dividends	Earned surplus on Dec. 31
1930	$5,771.21	$10,000	$36,527.53
1931	3,659.48	8,000	32,187.01
1932	(1,107.77)	8,000	23,079.24
1933	4,290.16	2,000	25,369.40

Western Associates, Inc., received no income and had no expenses prior to December 31, 1933.

30. In the years 1923-1933 transactions in Jersey Co. 4 percent and 5 percent bonds took place on the Boston Stock Exchange as follows:

Year	5% bonds	4% bonds	Year	5% bonds	4% bonds
1923	$294,000	$80,000	1930	$168,000	$113,000
1924	374,000	119,000	1931	161,000	51,000
1925	320,000	109,000	1932	191,000	99,000
1926	290,000	133,000	1933	161,000	65,000
1927	138,000	33,000			
1928	95,000	28,000	Total	2,682,000	929,000
1929	490,000	99,000			

In the years 1926-1933 the Jersey Co. 4 percent and 5 percent bonds were offered for sale by brokers on the over-the-counter market, the high and low asked prices being as follows:

	4% bonds		5% bonds	
	High	Low	High	Low
1926 (last half)	91	90	101½	97¾
1927	93	90	102	100¼
1928	92½	92	103	98
1929	....	....	....	....
1930	95	90	103	100
1931	96	81⅜	104¼	90
1932	90	68	98	83
1933	93	85	101	93¼

The high and low actual market sales prices of the Jersey Co. 4 percent and 5 percent bonds in the years 1913-1933 were as follows:

	4% bonds		5% bonds	
	High	Low	High	Low
1913	86½	79	100⅜	98¼
1914	84	80	101⅛	99
1915	85	82	100⅛	100
1916	87	84	102	100½
1917	87	84¾	102½	91¼
1918	75	72½	93	87½
1919	77	71	94½	83½
1920	71	60	84½	74
1921	75¼	63	88¼	74
1922	84	74¾	97	89¾
1923	84	78½	95	88½
1924	84½	80	98½	92¾
1925	87	84	100	96
1926	90	86	102	99

1927	91	88½	102⅞	100½
1928	94½	89	104	100¾
1929	89	83	101⅞	94
1930	94⅛	86	102⅜	98½
1931	95¼	90	104	90
1932	90	75	98½	81
1933	93¾	82	101¼	90

In the years 1926-1933 the Elevated Co. bonds were offered for sale by brokers on the over-the-counter market, the high and low asked prices being as follows:

	High	Low		High	Low
1926 (last half)	85½	83½	1930	83	78½
1927	89½	84½	1931	85	73
1928	89½	82½	1932	80	62
1929	....	....	1933	75	67½

31. During the years 1930-1933 there grew up among the packers a practice of buying livestock directly from the farmers in the country, shipping to smaller stockyards and conveying it by truck to the packing houses, thereby avoiding the Chicago stockyards entirely. Packing houses had also been built in Iowa and southern Minnesota, causing a shrinkage in the revenue of the Chicago stockyards in the years 1930-1933. In 1932-1933 Prince, with the funds in the form of notes furnished by the petitioner, purchased $1,000,000 of stock in Armour & Co., sufficient to enable him to become chairman of the board of directors of that company and retain its business for the Chicago stockyards.

32. During the years 1930-1933 the petitioner had substantial sums on deposit in banks, receiving interest at the rate of 3 percent for the first six months in 1930, 2½ percent for the last six months in 1930 and for the first six months in 1931, 2 percent for the last six months in 1931 and for the year 1932, and 1½ percent for the first six

months of 1933, when interest payments on ordinary commercial deposits stopped.

In the years 1930-1933 the petitioner loaned to the District amounts as follows: 1930, $800,000 to meet the District's maturing bonds; 1932, $275,000 to meet bonds maturing in that year and $275,000 to assist in the erection of a building upon land sold by the District; 1933, $275,000 to meet maturing bonds. The petitioner loaned to the Pau Corporation, for the purpose of purchasing machinery installed in the plant of Produce Terminal, $189,503.34 in 1932 and $47,033.17 in 1933, no interest being paid to the petitioner on such loans.

33. The petitioner acquired Jersey Co. common stock continually from 1911 through 1933. On December 31, 1929, it had acquired 58,742 of the 65,000 shares outstanding, and on December 31, 1933, it had acquired 60,336 shares. Of the 60,336 shares, 31,310 were acquired in exchange for $6,262,000 par value of the petitioner's bonds and 29,026 for $4,979,352.19 cash. In the years 1929-1933 the petitioner acquired 2,362 shares of Jersey Co. preferred stock at a total cost of $218,933.33; it had made no purchases of such stock prior to 1929. In 1918 the petitioner paid F. H. Prince & Co. $3,190,339.96 for 17,929 shares of Jersey Co. common stock, which the latter had acquired in the years 1911-1918, and $243,354.39 for $286,000 face value of petitioner's 5 percent bonds. In 1922 the petitioner began to pay cash for its purchases of Jersey Co. stock. During the years 1930-1933 the petitioner purchased Jersey Co. common and preferred and its own 5 percent bonds in amounts and at costs as follows:

Year	Security	Cost
1930	253 shares Jersey Co. common	$42,958.25
	190 shares Jersey Co. preferred	19,113.50
	Petitioner's 5% bonds, $90,000	76,562.00
	Total	138,633.75

1931	604 shares Jersey Co. common	$99,875.50
	616 shares Jersey Co. preferred	59,909.25
	Petitioner's 5% bonds, $57,500	43,722.00
	Total	203,506.75
1932	380 shares Jersey Co. common	$57,163.70
	302 shares Jersey Co. preferred	25,979.03
	Petitioner's 5% bonds, $447,500	294,020.75
	Total	377,163.48
1933	357 Jersey Co. common	$45,803.00
	797 shares Jersey Co. preferred	68,110.05
	Petitioner's 5% bonds, $14,000	8,802.50
	Total	122,715.55

In 1933 the petitioner also issued $2,000 face value of its 5 percent bonds for 10 shares of Jersey Co. common.

34. In the years 1931-1933 F. H. Prince & Co. sold securities to the petitioner, and Prince on his income tax returns for these years took and was allowed by the Commissioner deductions for losses on such sales, the selling price, cost, and losses being as follows:

Year	Selling price	Cost	Loss
1931			
$150,000 Amoskeag Mfg. Co. 6's	$84,000.00	$141,299.55	$57,299.55
$10,000 Chi. Mil. & St. Paul R. R. 5's	1,155.00	10,600.00	9,445.00
1,500 shares Western Dairies	4,140.00	16,422.84	12,282.84
846 shares Tidewater Asso. Oil	2,229.21	20,900.00	18,670.79
1,000 shares Hoosac Mills 7% pfd	22,819.00	100,000.00	77,189.00
10,000 shares Armour & Co., "B"	5,850.00	27,087.50	21,237.50
Total			196,124.68

1932				
$141,400	Amoskeag Mfg. Co.	56,148.94	133,198.36	$77,049.42
884	shares Soo Leased lines	3,402.40	46,205.64	42,803.24
3,000	shares First Natl. Bk Boston	78,557.00	180,333.42	101,776.42
	Total			221,629.08
1933				
2,486	shares First Natl. Bk. Boston	58,664.00	152,766.22	$93,102.22

No securities were sold by F. H. Prince & Co. to the petitioner in 1930. In 1932 the petitioner sold to F. H. Prince & Co., Inc., 3,050 shares of the Stock Yards National Bank and 240 shares of the Central Manufacturing District Bank at a loss to the petitioner of $221,202.03.

35. In each of the years 1930-1933 Prince held offices and received annual salaries as follows:

President of the Jersey Co.	$17,500.00
Chairman of the board of directors of the Transit Co.	17,500.08
Chairman of the board of directors of the Railway Co.	12,499.92
President of the petitioner	50,000.00

Until his death in 1926, J. A. Spoor was president of the Transit Co. and in complete control of the Transit Co., Railway Co., and Elevated Co. He sent reports to F. H. Prince & Co. in Boston. After Spoor's death Prince became chairman of the board of directors of the Transit Co. and representatives of the petitioner went to Chicago with increasing frequency, giving orders and directions. There was daily contact by telephone between the men operating the companies in Chicago and the officers of the petitioner. Prince handled the stockyards banking situation from 1930 to 1933. Ultimate choice as to officers, directors, and other personnel was dictated by Prince and

he decided dividend policies. He also gave instructions as to the banks in which funds were to be deposited and his authority was necessary for unusual expenditures by the Transit Co. After the destruction of part of the stockyards by fire, the president and vice president of the petitioner went to Chicago and gave orders as to what buildings should be rebuilt and how. The yards were not entirely restored. The restoration was paid for with insurance funds received by the Transit Co. In certain instances suggestions of the officers in Chicago were rejected by Prince. In 1933 Prince refused to permit the Transit Co. to spend enough money to build fireproof hog and sheep houses requested by the men in Chicago. Prince granted permission to rebuild the amphitheatre in which the International Live Stock Exposition was held.

36. Produce Terminal, the Transit Co., the District, and the Railway Co. sent to the petitioner monthly reports showing a summary of operations, which, except for the District's report, were copies of reports required by the Illinoi. Commerce Commission, the form of reports by the Transit Co. having been devised by its auditors. The petitioner assisted the District on many occasions in financing the construction of buildings. In 1932 it furnished between $300,000 and $400,000 for one building.

When the South Side Elevated Co., operating the Elevated Co. properties, went into receivership in 1932 the Jersey Co., as guarantor, paid the rental, which was used to pay the interest on the Elevated Co. bonds.

37. During the years 1930-1933 the individual income and surtaxes assessed against and paid by Prince were as follows:

1930	$51,570.96
1931	26,061.08
1932	20,023.94
1933	10,164.29

If the petitioner had distributed its annual profits for each of the years 1930, 1932, and 1933 the surtax liability of F. H. Prince would have been increased as follows:

1930	$572,234.91
1932	36,582.33
1933	377,706.61

38. It is stipulated that the petitioner is entitled for 1933 to a deduction not claimed on its return of $24,000 paid as an assessment made by the banking authorities of the State of Illinois against 240 shares of the Central Manufacturing District Bank owned by the petitioner.

39. The stockholders of the petitioner did not report any of the undistributed earnings of that company in the years 1930, 1932, and 1933 under the provisions of section 104 (d) of the Revenue Acts of 1928 and 1932.

40. Under the contract of October 1, 1914, wherein the petitioner guaranteed certain dividends and expenses of the Jersey Co., it was never called upon to make any payments pursuant to said guaranty, such expenses and dividends having been paid directly by the Jersey Co., after which the Jersey Co. was able to and did make large annual distributions of its earnings to the petitioner.

41. During the years 1930 to 1933, inclusive, and prior thereto the principal activity of the petitioner was the purchase and holding of securities and the collecting of dividends thereon, together with the lending of money to F. H. Prince. The majority of the securities so purchased were acquired by the petitioner directly from F. H. Prince or through the brokerage house owned by him which he conducted under the trade name of F. H. Prince & Co., upon which regular brokerage fees were paid by the petitioner.

42. At no time did the petitioner purchase any of the outstanding bonds of the Jersey Co. or the Elevated Co.

43. In its income tax returns for the years 1930 to 1933,

inclusive, the petitioner has described its business as that of "acquiring and guaranteeing securities."

44. During the years 1930, 1932, and 1933 the petitioner was a mere holding or investment company.

45. During the years 1930, 1932, and 1933 the petitioner permitted its gains and profits to accumulate beyond the reasonable needs of its business.

46. During the years 1930, 1932, and 1933 the petitioner was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

OPINION.

SMITH: The only issue for decision in this case is whether in 1930, 1932, and 1933 the petitioner was taxable under section 104 of the Revenue Acts of 1928 and 1932, that section being identical in both revenue acts.

Section 104 (a) subjects any corporation to a tax equal to 50 percent of its net income, in addition to the tax imposed by section 13, if it "is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed." Subdivision (b) provides that "the fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax." Subdivision (d) provides that "the tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year."

In his deficiency notice the respondent held that the petitioner was liable to the tax under section 104, saying:

After a careful consideration of your Federal income tax returns, the protests mentioned above, and all other available information, the Bureau holds that your corporation is subject to taxation under section 104 of the Revenue Acts of 1928 and 1932.

The petitioner in its brief calls attention to the fact that the respondent in his deficiency notice has not determined that the petitioner was either formed or availed of for the interdicted purpose, implying thereby that the Government's case would be stronger if he had made such a categorical determination in his deficiency notice.

We do not think that this is true. The respondent has determined, and has stated in his deficiency notice, that the petitioner is "subject to taxation under section 104 of the Revenue Acts of 1928 and 1929." The only possible factual basis upon which such a determination could rest is that the petitioner was either "formed" or "availed of" or that it was both formed and availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed. The necessary implication, we think, carries all the force of a specific determination that such were the facts. The petitioner apparently so understood, for it has adduced a mass of evidence directed towards disproval of those very facts.

In *C. H. Spitzner & Son, Inc.*, 37 B. T. A. 511, and *Mellbank Corporation*, 38 B. T. A. 1108, the respondent sent deficiency notices stating that the taxpayers were "subject to taxation under the provisions of section 104 of the Revenue Act of 1932," without stating or indicating whether such determination was based upon the premise that the taxpayers were "formed" or "availed of" for the prohibited purpose, or that the taxpayers were mere holding or investment com-

panies or that their gains and profits had been permitted to accumulate beyond the reasonable needs of the business. Nevertheless, we proceeded to determine the issue raised in the light of the evidence bearing upon the various factors essential to the respondent's determinations.

We think that the respondent's determination that the petitioner here is subject to tax under section 104 places the burden squarely upon the petitioner of proving that it was neither formed nor availed of for the interdicted purpose.

The petitioner makes the further contention that section 104 of the Revenue Acts of 1928 and 1932 is unconstitutional. This point must be decided against the petitioner's contention, in accordance with *Helvering* v. *National Grocery Co.*, 304 U. S. 282; rehearing denied, 305 U. S. 669.

The petitioner was formed in 1911. It clearly was not formed for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed, and the respondent does not so contend.

There remains for consideration only the question whether the petitioner was "availed of" during the taxable years for the interdicted purpose. The petitioner contends that it was not. The question must be answered in the light of all of the evidence. If the evidence establishes the fact either that the petitioner was a "mere holding or investment company" or that the gains or profits have been "permitted to accumulate beyond the reasonable needs of the business," a prima facie presumption arises of a purpose on the part of the stockholders to escape the surtax.

We consider first the question whether the evidence establishes the fact that the petitioner is a "mere holding or

investment company." Petitioner admits that it is a holding company, but denies that it is a "mere" holding or investment company. It submits that it supervises and directs the policies and business operations, other than the daily routine, of all the companies constituting the stockyards enterprise, and acts as banker for them. It further submits that a "mere holding or investment company" is one that holds securities, collects, and possibly invests and reinvests income therefrom, and does nothing more. We think that this definition overemphasizes the importance of the word "mere" in the phrase above quoted. It was apparently the intention of Congress in using the phrase to differentiate a holding or investment company actively engaged in a trade or business from one which has income only from interest and dividends and profits from the sale of securities, and limits its activities to those incident to an ordinary holding or investment company. Cf. *C. H. Spitzner & Son, Inc., supra.*

In *Rands, Inc.*, 34 B. T. A. 1094, the Board said:

> . . . The term "holding company" does not exclude one which actively deals with the funds contributed by its principal and almost sole shareholder, instead of being a passive repository or "holder" of the funds or assets. Cf. *Keck Investment Co. v. Commissioner, supra, R. & L., Inc. v. Commissioner, supra.* An investment company is not to be defined as one restricted to long term investments for regular income and excluding one which trades in the market and buys and sells speculative stocks or real estate. . . .

In *Reynard Corporation*, 37 B. T. A. 552, the facts were that an individual engaged in the creation of cartoons, whose income therefrom was $1,500 to $2,000 a week, caused a corporation to be organized, to which he transferred the greater part of his property for its capital stock. He became its president and contracted with the corporation to work for it at a salary of $2,500 a month. The corpora-

tion, through him as president, entered into a contract for three years with a syndicate for a guaranteed minimum payment of $1,500 a week for the use of cartoons to be created by the president during the three-year period. The activity of the corporation was that of entering into a contract pursuant to which it had a definite and fixed obligation. The Board held, nevertheless, that it was a "mere holding or investment company."

In *R. & L., Inc.*, 33 B. T. A. 857; affd. (C. C. A., 5th Cir.), 84 Fed. (2d) 721; certiorari denied, 299 U. S. 588, the taxpayer contended that it was an operating company, engaged in the management of its properties, conducting a film booking business, and managing a chain of suburban motion picture theaters. We held that it was a "mere personal holding or investment company."

In *Almours Securities, Inc.*, 35 B. T. A. 61; affd., 91 Fed. (2d) 427; certiorari denied, 302 U. S. 765, the taxpayer invested a portion of its large income in real estate and in the acquisition of shares of stock of a number of banks and of other corporations whose operations it actively supervised, and also operated a concession at Mt. Vernon, Virginia. We held that those activities were inconsequential when the size of the corporation was taken into consideration. Without finding that the corporation was a "mere holding or investment company," we said: "The evidence conclusively shows that the petitioner was primarily a 'holding or investment company.'" In affirming our decision in that case the Circuit Court of Appeals said:

> Petitioner's operations were conducted largely through subsidiaries, which were looked after by Mr. du Pont and his brother-in-law, Mr. Ball. After a portion of its cash net earnings was distributed, the remainder was permitted to accumulate beyond the reasonable needs of its business, and reinvested, thereby saving a large amount of income tax which the stockholder would have been obliged to pay for the years in controversy.

In all of its income tax returns for the years 1930 to 1933, inclusive, the petitioner described its business as that of "acquiring and guaranteeing securities." So far as the evidence shows the petitioner guaranteed no securities after the execution of its agreement of October 1, 1914. Since under that agreement it was to receive all of the earnings of the Jersey Co. and its subsidiaries, after the payment of interest and expenses, it guaranteed the payment by the Jersey Co. of interest on the bonds of the Jersey Co. and its subsidiaries, and of dividends of 9 percent upon the stamped certificates of common stock of the Jersey Co. and of 6 percent upon the preferred shares of that company. It did not, however, guarantee the payment of the principal of the bonds above referred to. They were fully secured. The petitioner has never been required to pay out a dollar under its guaranty. During the tax years before us the petitioner collected its income, sold certain securities, made loans to Prince and to the Pau Corporation, wholly owned by Prince, and to the District, and purchased shares of stocks and bonds.

The petitioner's income during the years 1930 to 1933 consisted exclusively of interest, dividends, and profits from the sale of securities. It received no fees for the management and supervision of other corporations. Its office was Prince's office at 1 Court Street, Boston, Massachusetts. An inspection of its income tax returns shows that it had practically no office expenses. It paid no rent except vault rent. It paid its president a salary of $50,000 per annum, its treasurer a salary of $500 per annum, and "wages" of $2,000 per annum. It paid no other salaries or wages. McDonough was Prince's secretary and was also vice president of the petitioner. He did not, however, receive any salary from the petitioner.

On brief the petitioner submits:

We do not see how the fact that a company had small expenditures is of any real materiality in determining whether or not it is a mere holding company when the only functions claimed for it to bring it out of the category of "mere" is that it supervises and directs the policies and business operation, other than daily routine, of other companies, and finances these companies, acting as sort of a bank for the enterprise. These are functions which require more brain than brawn, so to speak, and do not require any physical expenditure of funds. No large office or office force is needed. As was testified to, the work consisted of mental operations on the part of Mr. Prince and his assistant, Mr. McDonough. . . .

It is true, of course, that Prince supervised the operations of the Jersey Co. and all of its subsidiaries as well as of the subsidiaries of the petitioner. He was enabled to do this through ownership of all the stock of the petitioner, which had virtual control through stock ownership of the other corporations. He was president of the Jersey Co., from which he received an annual salary of $17,500. He was also chairman of the board of directors of the Transit Co., from which he received a like salary, and chairman of the board of directors of the Railway Co., from which he received a salary of $12,499.92. He dictated the policies of the petitioner and of all of the other companies. It does not appear, however, that the petitioner supervised and managed the operations of its subsidiaries and those of the Jersey Co. and its subsidiaries. Prince did this himself. So far as appears, there were no meetings of the board of directors of the petitioner for the determination of any acts to be done by any of the companies. The returns of the Transit Co. and the Railway Co. report Prince as devoting 58 percent of his time to the affairs of the former and 42 percent to the latter. When directing the affairs of those companies Prince was acting as a paid employee of those companies and not of the petitioner.

A corporation which is a mere holding or investment company is subject to the tax imposed by section 104 (a) in the absence of a showing that it was not availed of for the interdicted purpose or that the stockholders included in their individual returns the company's earnings in accordance with section 104 (d). The evidence shows that the stockholders of the petitioner did not return the undistributed earnings and we think that it fails to show that the corporation was not availed of to prevent the imposition of the surtax upon its stockholders.

Section 104 was not leveled solely against holding and investment companies. Any corporation which permits its gains or profits to accumulate beyond the reasonable needs of the business is presumably availed of for the condemned purpose. We next consider the evidence bearing on the accumulation of gains or profits beyond the reasonable needs of the business.

Up to December 31, 1929, the petitioner had accumulated an earned surplus of $19,615,905.69. It had outstanding 5 percent bonds maturing in 1961 of a par value of $3,227,000. It had on hand cash in the amount of $6,689,304.26. It had notes receivable from F. H. Prince, its sole stockholder, in the amount of $3,104,400. Its principal investments consisted of Jersey Co. common shares, $10,993,551.74; Jersey Co. preferred shares, $45,821.50; and other investments at cost, some of which were not related to the Chicago stockyards enterprise, of $1,467,338.35. The character of some of these investments is shown by an analysis of petitioner's dividend receipts for 1929 as follows:

Chicago Junct. Rys. & Union Stock Yards Co.	$200,000.00
Chicago Junct. Rys & Union Stock Yards Co. common	247,272.75
Union Stock Yards & Transit Co.	420,702.00
Union Stock Yards & Transit Co. investment account	128,521.74

Chicago Junction Railway Co.	1,427,500.00
Produce Terminal Co.	200,000.00
Old Colony Trust Associates	2,000.00
Stock Yards National Bank	9,760.00
First National Bank of Chicago	2,413.00
U. S. Cold Storage common	4,333.50
U. S. Cold Storage preferred	1,750.00
Central Mfg. District Bank	4,000.00
Midland Warehouse common	2,796.00
National Shawmut Bank	350.25
Westland Oil	340.00
	2,651,739.24

During the four years 1930 to 1933 the petitioner had a net income of $10,243,373.01. During the same period it paid out in dividends $1,600,000; reduced its liabilities in the amount of $574,298.65; added to its cash on hand $2,755,931.71, $1,800,000 of which was subordinated to the claims of other depositors in a Chicago bank; loaned to the District (Central Manufacturing District), a common law trust beneficially owned by the Jersey Co., $1,625,000 to enable it to pay off some of its bonds and to make improvements to its properties; increased its loans to Prince in the amount of $1,743,600; loaned $236,536.51 to the Pau Corporation (wholly owned by Prince) upon which no interest was ever received; and spent $1,500,000 in the acquisition of shares of stock of Western Associates, Inc., $245,800.45 for 1,584 shares of common stock and $173,111.83 for 1,905 shares of preferred stock of the Jersey Co., $423,107.25 in the purchase of $609,000 par value of its 5 percent bonds of 1961, and various amounts in the purchase of other securities.

As a holding company, the petitioner had no need for the accumulation of gains and profits. In the ordinary holding or investment company the excess of income over expenses is either paid out in dividends or invested in additional income-producing assets. That is the use which

the petitioner made of its excess income. That use can not be regarded within the reasonable needs of the busines.

The petitioner contends, however, that it was more than a holding or investment company—that it was engaged in the business of managing the Chicago stockyards enterprise through subsidiary companies in which it owned an interest and that it was necessary for it to finance those companies. It claims that for that purpose it had need of a large surplus.

But even as a management company, we can not see that the petitioner had need for the accumulation of a large surplus. The only expense connected with the management were the payment of salaries and wages in the amount of $52,500 per year, and the annual income amply provided that revenue.

We do not see either that the petitioner had any need of an accumulation of gains and profits for the purpose of financing other corporations. It was not obligated on the principal of any bonds other than its own which were outstanding at December 31, 1929, in the amount of $3,227,000. It had guaranteed the interest, on the bonds of the Jersey Co. and its subsidiaries and dividends on the Jersey Co. common and preferred shares outstanding. But the evidence is to the effect that the petitioner had never been required to pay out a dollar under its guaranty. If it might be assumed that the petitioner needed some accumulation of gains and profits to provide for its guaranty, it should be noted that upon a paid-in capital of $1,000,000 it had accumulated gains and profits up to December 31, 1929, of almost $20,000,000. Certainly there is no indication of the need for any further accumulation in the years 1930, 1932, and 1933.

The evidence shows the manner in which the petitioner has used its earnings from the date of incorporation. It

has been free to use them in any manner it saw fit. It has used a large part of them in the purchase of shares of stock of the Jersey Co. The next most important item is loans made to Prince. During the years 1930 to 1933 the petitioner loaned $1,625,000 to District and $236,536.51 to the Pau Corporation. It had no financial interest in the latter. The necessity for these loans, if any existed, is not shown.

It is the claim of the petitioner that Prince, its principal stockholder, and during most of the years its sole stockholder, contemplated the liquidation of the Jersey Co. upon the expiration of its charter on June 10, 1940; that for such purpose Prince desired to acquire as many shares of Jersey Co. common stock as he could purchase at a reasonable price before 1940; that he was not so much interested in the purchase of preferred stock because that could all be acquired at par upon the liquidation of the Jersey Co. in 1940; that he also desired to accumulate in the treasury of the petitioner sufficient assets to pay off all the bonds of the petitioner and of the Jersey Co. and its subsidiaries by 1940.

The plan as at the close of the year 1929 contemplated an accumulation of cash and liquid assets in the treasury of the petitioner, its subsidiary, Produce Terminal, and the Jersey Co. and its subsidiaries of approximately $36,000,000, divided as follows:

Total bonded indebtedness	$23,963,000.00
Preferred stock Jersey Co. (64,543 shares)	6,454,300.00
Common stock Jersey Co. (6,258 shares)	1,034,134.50
Working capital	5,000,000.00
Total	36,451,434.50

The bonds and debenture notes of the petitioner and the Jersey Co. and its subsidiaries outstanding on December 31, 1929, were as follows:

Petitioner	
5% bonds maturing 1961	$ 3,227,000
Jersey Co.	
5% bonds maturing April 1, 1940	10,000,000
4% bonds maturing April 1, 1940	4,000.00
Transit Co.	
Debenture notes maturing 1930	500,000
Elevated Co.	
4% bonds maturing March 1, 1945	2,327,000
District maturing various dates to 1941	3,909,000
Total	23,963,000

We do not think that an accumulation of surplus for the purposes above indicated was within the reasonable needs of the petitioner's business. As above indicated, the petitioner was obligated to pay off only $3,227,000 of the $23,963,000 bonds outstanding at the end of 1929. It had on hand more than twice as much cash as was necessary to redeem those bonds and they did not become due until 1961.

Clearly, there was no reasonable need for the petitioner to acquire the balance of the common stock and the outstanding preferred shares of the Jersey Co. Amounts spent in the acquisition of those shares simply represented investments by the petitioner. The same also is true of any amounts that it might expend in acquiring the bonds of the Jersey Co. and its subsidiaries.

The bonds of the Jersey Co. and of its subsidiaries were well secured by deposit of collateral. The Jersey Co. had $14,000,000 of bonds outstanding since about 1890. In 1915 $10,000,000 of its bonds matured and were refunded without any assistance from the petitioner. The evidence shows that the real estate of the District has increased greatly in value since purchased. The earnings of the Jersey Co. have likewise increased greatly and that company is assured of the receipt of $2,000,000 annual rental of the Belt

Line railway. This lease does not terminate until 2021. Prince testified to the great value of this lease to the New York Central and that he had nothing to fear from a receivership of that company, since the lease was desired by other railroads.

The bonds of the Elevated Co. outstanding in the amount of $2,327,000 appear not to be well secured except through the guaranty by the Jersey Co. But the Jersey Co. is amply able to take care of both its own bonded indebtedness, and that of the Elevated Co.

The petitioner submits that on December 31, 1929, all of the companies constituting what it regards as the Chicago stockyards enterprise had cash and assets readily convertible into cash, without selling any of the shares of stock of the companies of the enterprise of a value of $19,691,666.52. However, that does not take into account the fixed assets of the companies representing the investment in the stockyards, in the railroad, and in other properties. Those assets are income-producing assets of great value. The net consolidated assets of the Jersey Co. and its subsidiaries, as shown by its consolidated return at December 31, 1929, was approximately $40,000,000 in excess of all liabilities and the evidence is to the effect that the book values of some of the assets are much less than their real value. For instance, the book value of $2,500,000 Indiana Harbor Belt Railroad Co. bonds maturing in 1935 and bearing 4 percent interest and guaranteed principal and interest by the Lake Shore & Michigan Southern Railway Co. and the Michigan Central Railroad Co., is only $50,000.

Under his program Prince, through the instrumentality of the petitioner, would own in 1940 all of the assets of the Jersey Co. and its subsidiaries, of a value of more than $60,000,000, free of debt.

In *Keck Investment Co.*, 29 B. T. A. 143; affd. (C. C. A.,

9th Cir.), 77 Fed. (2d) 244; certiorari denied, 296 U. S. 633; the taxpayer contended "that it was necessary for it to finance the Superior Oil Co., which had little bank credit, and that if it had not financed that company its investment in it would have been lost by forfeiture of leases." In our opinion we stated that we were not impressed by this argument; that "The business of the Superior Oil Co., was not the business of this company."

In the proceeding at bar we do not think that the evidence shows a reasonable need of the petitioner for any further accumulation of gains and profits during any of the years 1930, 1932, and 1933.

We have found on the evidence before us (1) that the petitioner is a "mere holding or investment company", and (2) that its gains or profits have been permitted to "accumulate beyond the reasonable needs of the business." The existence of these facts raises the statutory presumption that the corporation was "availed of" for the interdicted purposes, and we think that the evidence has not overcome the presumption.

Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose. The bare recital of the undisputed facts relating to the organization of the petitioner, the balance sheets, the source of earnings, the nature of the investments, the large accumulations of cash and surplus, the loans of cash and securities to the petitioner's sole stockholder, and the continued reinvestment of its gains and profits in securities, present, in our opinion, a situation typical of situations which Congress intended to cover by section 104 of the Revenue Acts of 1928 and 1932.

It should be borne in mind that the petitioner was solely owned by Prince from 1922 to June 1, 1932, and, for all

practicable purposes, thereafter. The petitioner was the *alter ego* of Prince. It was Prince in corporate clothes. It was of no moment to Prince whether the earnings of the petitioner were carried in his individual pocketbook or in his corporate pocketbook, except that if they had been received in the first instance in his individual pocketbook or distributed to him by the petitioner he would have been subjected to heavy surtaxes upon them, while he avoided such surtaxes by retaining them in the corporation. The situation is analogous to that which obtained in *Helvering v. National Grocery Co., supra,* where an operating company organized in 1908 had accumulated a surplus of approximately $8,000,000 and had cash and securities on hand aggregating approximately $4,250,000, which represented four-fifths of the total accumulation of surplus profits during the last ten years. The Supreme Court said:

> Since Kohl was the sole owner of the corporation, the business would have been as well protected against unexpected demands for capital, and assured of capital for the purpose of any possible expansion, by his personal ownership of the securities as by the corporation's owning them. . . .

The petitioner was the means by which Prince had succeeded in accumulating up to 1929 a personal fortune of between $15,000,000 and $20,000,000 practically immune from taxation; for the income of the petitioner consisted almost exclusively of dividends received from domestic corporations which were a legal deduction from its own gross income. The result was that the petitioner had in many years no taxable income, and in other years only a small taxable income.

The evidence shows that the petitioner was availed of by Prince for the purpose of reducing his own tax liabilities. Over a number of years Prince had accumulated more than 17,000 shares of Jersey Co. common stock upon which he

was receiving an annual dividend of $9 per share. These were his own shares of stock. The dividends on them were taxable to him. In 1918 he transferred all of those shares of stock to the petitioner at cost and was thereafter relieved from the payment of surtax upon the dividends thereon.

Prince started borrowing money from the petitioner in 1911. The amount of his borrowings increased irregularly from year to year. He was indebted to the corporation at December 31, 1929, in the amount of $3,104,000 and at the end of 1933 in the amount of $4,848,000. The amount of the debt increased in subsequent years. The borrowed funds were used for various purposes. It is true that he paid interest to the petitioner of 4 percent upon the money borrowed, the payment of which interest was deducted from his gross income in his individual tax returns. He also borrowed securities of large value from the petitioner, which he used as collateral to obtain loans at banks.

There is no satisfactory explanation of why the petitioner did not make a dividend distribution to Prince of the funds which he needed.

In the case of *Helvering* v. *National Grocery Co., supra,* the Supreme Court said:

> . . . As was stated in *United Business Corporation* v. *Commissioner, supra,* 62 F. 2d page 755: "These loans are incompatible with a purpose to strengthen the financial position of the petitioner, but entirely accord with a desire to get the equivalent of his dividends under another guise."

To the same effect see *William C. deMille Productions, Inc.,* 30 B. T. A. 826, and *Mead Corporation,* 38 B. T. A. 687.

It furthermore appears that in 1931, 1932, and 1933 Prince sold securities to the petitioner for $120,193.21, $138,108.35, and $59,664, respectively, which enabled him to deduct from gross income in his income tax returns for those years losses of $196,124.68, $221,629.08, and $93,102.22, re-

spectively, and in 1932 the petitioner sold to F. H. Prince & Co., Inc., which was organized by Prince on June 1, 1932, shares of the capital stock of the Stock Yards National Bank and of the Central Manufacturing District Bank, which enabled the petitioner to claim a deductible loss of $221,202.03. The shifting of these securities from Prince to the petitioner and from the petitioner to Prince really meant no economic loss to Prince and the investment by the corporation of the amounts of money spent in acquiring the securities from Prince was not in furtherance of the program which Prince claims to have had for the corporation.

It is agreed that if all of the net income of the petitioner for the taxable years 1930, 1932, and 1933 had been paid out as dividends the additional surtaxes payable by Prince would have amounted to $572,234.91 for 1930; $386,582.23 for 1932; and $377,706.61 for 1933, or a total for the three years of $1,336,523.85. This does not take into account any tax liabilities which might have been incurred by the other stockholder after January 1, 1932, or the tax which would have been payable by the F. H. Prince Trust if it had received and passed on the dividends. By the failure of the petitioner to distribute its profits during the three years before us Prince has avoided the payment of surtaxes in the amount of at least $1,336,523.85.

Section 104 (d) of the Revenue Acts of 1928 and 1932 provides a means by which a holding or investment company which accumulates its gains or profits beyond the reasonable needs of the business may avoid the payment of the tax imposed by section 104 (a). Subdivision (d) provides that the tax shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year. It has been stipulated in this proceeding that the

stockholders of the petitioner did not so report the earnings of the petitioner during the years before us.

Although Prince testified that under his program it was contemplated that the Jersey Co. would be liquidated in 1940, there appears to be no necessity for its liquidation and many reasons why it probably will not be liquidated. When the petitioner was organized in 1911, an issue of $14,000,000 bonds was provided for. The petitioner covenanted with the trustee that it would do all that was necessary for it to do to continue the existence of the Jersey Co. The outstanding bonds of the petitioner are callable at 105, but if they are not called and paid off the petitioner is under obligation to continue the existence of the Jersey Co.

McDonough, petitioner's vice president, testified that either he or Prince had consulted counsel as to the possibility of obtaining an extension or renewal of the Jersey Co.'s charter. Counsel advised that such an extension or renewal could undoubtedly be obtained under the New Jersey statutes. They simply require a consent of two-thirds of each class of stock of the old corporation. It is inconceivable that the petitioner can not obtain such a consent. It owns more than two-thirds of the common shares, and the preferred shares bearing a 6 percent dividend are well secured by assets and earnings.

Upon a liquidation of the Jersey Co. in 1940 the petitioner would apparently be subject to heavy income taxes; for its investment in the common and preferred shares and in the bonds of the Jersey Co. and its subsidiaries would amount to not more than $35,000,000 and the assets acquired would apparently have a value, based upon cost, book values, and earnings, of more than $60,000,000. Although

it may be desirable to merge or consolidate the petitioner and the Jersey Co., it seems doubtful whether the Jersey Co. will be liquidated in 1940.

In its brief petitioner calls attention to our opinion in *Mellbank Corporation, supra.* It states that its situation is in no great respect different from the situation which existed in that case and that, since we reached a conclusion that the taxpayer was not subject to tax under section 104, the same conclusion is warranted here.

Each case involving the application of section 104 must be decided upon its own facts. In the *Mellbank* case the Board said in its opinion:

> . . . Obviously, petitioner was not a mere holding or investment company. It had no investments in, and was not holding any corporate stocks, other than stocks of its member banks, which was necessary to enable it to carry on its business of managing, supervising, and operating those banks. . . .

The only year before us was 1932. The taxpayer had no taxable income for that year, after the deduction of dividends received upon certain shares of stock. Its net accumulation of gains and profits for the taxable year was only $98,444.32. We held upon the evidence as a whole that the corporation had not been availed of for the interdicted purpose stated in section 104 of the Revenue Act of 1932.

In our opinion the evidence in the proceeding at bar establishes that the petitioner is a mere holding or investment company; that its gains and profits were permitted to accumulate beyond the reasonable needs of the business; that the petitioner had no reasonable need to add to the earned surplus on hand at December 31, 1929, any part of the gains and profits of the years 1930, 1932, and 1933; and that it fails to show that such accumulation was not for the pur-

pose of preventing the imposition of the surtax upon its shareholders.

Reviewed by the Board.

Decision will be entered under Rule 50.

STERNHAGEN, dissenting: In my opinion, the evidence requires a finding that the petitioner was not availed of for the purpose of enabling its shareholder to escape surtax. The accumulation of earnings and profits was not for the purpose of reducing or preventing taxes but for the purpose of meeting the forthcoming demands occasioned by the termination of the Jersey Co.'s charter in 1940. This positive business purpose appears not alone from the testimony of Prince, but also from the testimony of others who have been intimately associated with the business for many years. These witnesses were entitled to belief and their testimony is credible and in no respect impugned or otherwise weakened either by cross-examination or countervailing testimony.

Throughout the existence of the corporation since 1911, the dominant objective has been to accumulate a surplus with which to acquire all of the Jersey Co.'s common and preferred shares by 1940 and liquidate its indebtedness and the outstanding indebtednesses of other companies which the liquidation would entail. There is no reason why the Board should be incredulous of the several statements of that continuous purpose. It would be reasonable to infer such a purpose even if there were no direct testimony that it existed. Furthermore, opinion witnesses for both the petitioner and the Government all testified that such a purpose would be reasonable. The only witnesses for the Government were three analysts who, after a study of the history and the probable future, agreed that the liquida-

tion of the Jersey Co. in 1940 was a desirable objective and that it would not be unreasonable to build up a fund to provide for it.

Despite this evidence, however, the Board holds from the circumstances that it will not be necessary to liquidate the Jersey Co. or the several indebtednesses which will then and soon thereafter become due, and concludes that the accumulation for that purpose is unnecessary and unreasonable. Upon these rationalized postulates, the Board, contrary to the only direct evidence in the record, holds that there was a purpose to prevent the imposition of the surtax upon the shareholder. Thus the single ultimate finding of fact upon which the imposition of the additional tax is expressly required by the statute to be conditioned is built up from circumstances many of which are beside the point of the statute. The purpose which the Board finds to exist is not an actual purpose but is a sort of constructive purpose, as if from the circumstances one must inevitably conclude that the conduct of the corporation and its officers could not reasonably have occurred unless the tax-saving purpose existed. Section 104, however, clearly requires the actual existence of the tax-saving purpose to support the 50 percent additional tax; and where the taxpayer by a fair preponderance of the evidence establishes that the purpose did not in fact exist, there is no justification for fabricating it by construction.

The corporation began its life as a vehicle to facilitate the reorganization which would be required in 1940. This is not questioned. Never throughout its history has there been a departure from this plan. It began in 1911 before there was any substantial corporation tax, before there was any constitutional power to impose an income tax, and many years before there was any thought of an individual surtax. There has been a uniform policy since 1923 to distribute a

dividend of 5 percent on the capital stock and accumulate the remaining earnings. There was no change in this policy in 1930 to denote a tax-saving purpose. This plan persisted without question throughout the years after the 1918 Act, when there was first imposed an additional tax upon the corporation by reason of the nondistribution of earnings.

During all the years since such a tax was first enacted it has been predicated on the purpose to prevent shareholders' surtax. Always this factor has been known to be a difficult one for the Government and a serious impediment to the collection of such taxes. Purpose has always been recognized as something hard for the Government to prove and easy for the taxpayer to disprove. Yet the tax with this condition was deliberately reenacted time and time again. It still exists in section 102 of the 1938 Act.[1] Not until the enactment, after vigorous legislative debate, of the Revenue Act of 1934 was a tax imposed on undistributed net income irrespective of purpose. This was in the personal holding company tax of Title I A. It was new and prospective legislation. Later, in section 14 of the 1936 Act, the undistributed profits tax was added. It is improper, therefore, for the Board, in 1940, to apply the 1928 and 1932 statutes as if they imposed the high additional tax upon all the corporation's net income although it had no purpose of preventing surtax on its shareholders. This is in effect to apply the later type of tax retroactively to a period when it was expressly and knowingly rejected by Congress. It is treating the language of the controlling statute as if it were a mere figure of speech.

If I understand the Board correctly, they say that the accumulation of $19,615,905.69 by December 31, 1929, was

[1] Section 102 of the 1938 Act still fixes purpose as a necessary condition of the tax but the presumption that an unreasonable accumulation evidences the disapproved purpose is made more difficult to overcome since the taxpayer must prove its absence of purpose by a clear preponderance of the evidence and not merely by enough evidence to overcome a prima facie case.

enough for the forthcoming needs of 1940, and that the profits added in 1930, 1932, and 1933 were therefore beyond the reasonable needs of the business and *ergo* only explicable as a means of tax avoidance for the shareholder. No doubt the Board has the power and the duty to determine whether gains or profits have been permitted to accumulate beyond the reasonable needs of the business; but the determination should be more than a substitution of the Board's judgment for that of the managers of the business—particularly when the Commissioner has made no determination on the subject. For myself, I am unable to draw a line at December 31, 1929, between the limit of reasonable accumulation and additions to it, label the latter as excessive and unreasonable, and, so labeled, regard the additions in the taxable years as a manifestation of the disapproved purpose.

To point to the fact that Prince began his stockyards venture with a comparatively small investment which has grown into a large fortune, and that in the intervening years his personal taxes and those of the petitioner have been relatively small, is to disclose a type of reasoning which, in my opinion, should have no place in tax adjudication. Nothing in the record discloses any actual or attempted escape from taxes imposed by law. This drastic additional tax can not be justified for the years in question by pointing to the extent to which the taxpayer and its shareholder have paid less than it is thought, by some nonlegal yardstick, that they should have paid. The tax, to be sure, was intended as a penalty; but that is the more reason why it should be applied with a careful regard for its terms and not sentimentally.

The loans which petitioner made to Prince were consistently used by him and his brokerage firm to buy the securities of stockyards corporations. Only once does it

appear that he used any of the borrowed funds for a private purpose. This was in 1932, when he used $160,000 for a short period to finance the construction of his Newport house until he could sell his North Shore place. The securities which petitioner loaned to Prince were used by him as collateral to secure loans from banks for the purchase of stockyards securities, and the cash which petitioner loaned to Prince was used for the purchase of similar securities. Prince paid interest to the petitioner at the going rate on the cash loans and the petitioner received the income upon the securities which it loaned to Prince for purposes of collateral. In view of the evidence that the loans were made to Prince because as a broker he was in good position to buy stockyards securities whenever they were available, and that this was, throughout the entire history of the company, an incident to its general plan, it is misleading to find, as the Board does, that "the loans were used by Prince for any purpose desired by him." There is a clear distinction between these loans to Prince in carrying out the petitioner's business plan and the loans to the president in *National Grocery Co.* v. *Helvering*, 304 U. S. 282. In that case the loans were used by the corporate officer to invest in wholly unrelated securities for a profit, just as they might have been used by him if they had been distributed to him in dividends. The amounts loaned to Prince during the taxable years did not serve the purpose of disguised dividends. In 1930 the loans actually decreased by $916,250. Over the four years, 1930-1933, the net amount loaned to Prince was $886,070. Included in this net was the loan in 1933 of $1,000,000 which Prince used in the purchase, for $1,057,000, of the Armour shares. This purchase was made to acquire control of the Armour stock so that the profitable Armour business would be kept in the stockyards enterprise. I think, therefore, that when the circumstances of all the loans by

petitioner to Prince are given consideration they lose force as indicating any purpose to enable him to have the personal use of petitioner's earnings and yet escape surtax.

It is said that Prince sold securities to the petitioner at a loss, which gave him a personal income tax deduction, and the petitioner took similar loss deductions on sales to Prince. Aside from the fact that the amounts were comparatively too small to be indicative of a purpose under section 104, the decision in *W. S. Farish & Co.*, 38 B. T. A. 150; affd., 104 Fed. (2d) 833, establishes that this has no place under that section. Such transactions in themselves have no significance in determining whether the corporation was availed of to prevent surtax on the shareholder "through the medium of permitting its gains or profits to accumulate instead of being divided or distributed."

I am, therefore, of opinion that the reasoning of the Board in reaching its conclusion is unsound. The taxpayer has shown affirmatively an absence of actual purpose to prevent the imposition of surtax upon its shareholder, and, since this is the crux of the case, the determination of the Commissioner that the case is one under section 104 should be reversed and the resulting deficiency set aside.

MURDOCK, LEECH, and KERN agree with this dissent.

[Title omitted.]

ORDER.

[Dated March 22, 1940.]

For good cause shown of record, it is ordered that in the printed findings of fact and opinion of the Board in the above-entitled proceeding promulgated March 20, 1940, page 23, first line of finding "38" the year "1933" be and the same is hereby deleted and that there be substituted in lieu thereof the year "1932."

CHARLES P. SMITH, *Member.*

[SEAL.]

[Title omitted.]

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION.

[Filed April 5, 1940.]

The attached proposed computation is submitted, on behalf of the respondent, to the United States Board of Tax Appeals, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Board, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Board, pursuant to the statutes in such cases made and provided.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
R. H. TRANSUE,
Special Attorney, Bureau of Internal Revenue.

STATEMENT.

IT:R:A-Recomp.
AJT

In re: Chicago Stock Yards Company,
Boston, Massachusetts.
B.T.A. Docket: No. 83797.
Income Tax Liability.

Years	Tax Liability	Tax Assessed	Deficiency
1930	$1,910,467.38	$92,781.28	$1,817,686.10
1932	1,158,819.15	13,496.47	1,145,322.68
1933	1,160,075.13	12,963.21	1,147,111.92
Total	$4,229,361.66	$119,240.96	$4,110,120.70

Chicago Stock Yards Company
Year ended December 31, 1930.

Schedule 1 Adjustments to Net Income

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)	$1,286,536.44
Net income as determined under Board of Tax Appeals decision promulgated March 20, 1940 (Section 21)	$1,286,536.44
Net income, deficiency notice (Section 104(c))	3,512,166.03
Net income, Board of Tax Appeals decision (Section 104(c))	$3,512,166.03

Explanation of Changes

The United States Board of Tax Appeals in a decision promulgated March 20, 1940, sustained the Commissioner for the year 1930.

Schedule 2 Computation of Tax

Net income, Schedule 1, (Section 21)	$1,286,536.44	
Tax at 12% (Section 13)		$154,384.37
Net income, Schedule 1 (Section 104(c))	$3,512,166.03	
Tax at 50% (Section 104(c))		1,756,083.01
Total tax liability		$1,910,467.38
Total previously assessed: Account #401545		92,781.28
Deficiency		$1,817,686.10

Chicago Stock Yards Company

Year ended December 31, 1932.

Schedule 3 Adjustments to Net Income

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)		$ 310,679.56
Net income as determined under Board of Tax Appeals decision promulgated March 20, 1940 (Section 21)		65,447.53
Net adjustment as computed below		$ 245,202.03
Net income, deficiency notice (Section 104(c))		$2,544,834.00
Net income, Board of Tax Appeals decision (Section 104(c))		$2,299,631.97
Net adjustment as computed below		$ 245,202.03
Nontaxable income and additional deductions:		
(a) Loss on sale of stock	$221,202.03	
(b) Assessment on shares of stock	24,000.00	
Total	$245,202.03	
Net adjustment as above		$ 245,202.03

Explanation of Items

(a) In accordance with a stipulation filed with the United States Board of Tax Appeals the petitioner is entitled to deduct a loss of $221,202.03 in 1932 on the sale of 3,050 shares of the Stock Yards National Bank and 240 shares of the Central Manufacturing District Bank to F. H. Prince and Company, Incorporated.

(b) It is stipulated that the petitioner is entitled for 1932 to a deduction not claimed on its return of $24,000.00 paid as an assessment made by the banking authorities of the State of Illinois against 240 shares of the Central Manufacturing District Bank owned by the petitioner.

Chicago Stock Yards Company

Year ended December 31, 1932.

Schedule 4 Computation of Tax

Net income, Schedule 3 (Section 21)	$65,477.53	
Tax at 13¾% (Section 13)		$ 9,003.16
Net income, Schedule 3 (Section 104(c))	2,299,631.97	
Tax at 50% (Section 104(c))		1,149,815.99
Total tax liability		$1,158,819.15
Total previously assessed: Account #401883		13,496.47
Deficiency		$1,145,322.68

Year ended December 31, 1933.

Schedule 5 Adjustments to Net Income

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)	$ 95,324.01
Net income as determined under Board of Tax Appeals decision promulgated March 20, 1940 (Section 21)	$ 95,324.01
Net income, deficiency notice (Section 104(c))	$2,293,936.16
Net income, Board of Tax Appeals decision (Section 104(c))	$2,293,936.16

Explanation of Changes

The United States Board of Tax Appeals in a decision promulgated March 20, 1940, sustained the Commissioner for the year 1933.

Chicago Stock Yards Company

Year ended December 31, 1932.

Schedule 6 Computation of Tax

Net income; Schedule 5 (Section 21)	$95,324.01	
Tax at 13¾% (Section 13)		$13,107.05
Net income, Schedule 5 (Section 104(c))	$2,293,936.16	
Tax at 50% (Section 104(c))		1,146,968.08
Total tax liability		$1,160,075.13
Tax previously assessed: Account #401650		12,963.21
Deficiency		$1,147,111.92

[Title omitted.]

MOTION TO MODIFY FINDINGS OF FACT AND FOR ADDITIONAL FINDINGS OF FACT.

[Filed April 18, 1940.]

Now comes the petitioner and moves that the Board modify its findings of fact and make additional findings of fact as follows:

1. By making an additional finding of fact as follows:

The facts contained in the stipulation of facts and the exhibits attached thereto filed in this case are true and we find them to be facts.

REASONS.

While the Board treated the facts in the stipulation as facts, there was no formal finding to that effect and one should be made.

2. By making an additional finding of fact as follows:

It is stipulated that the petitioner is entitled for 1932 to a deduction claimed on its return but disallowed by the Commissioner in his notice of deficiency in the amount of $221,202.03 representing a loss claimed upon the sale in that year of 305 shares of the capital stock of Stockyards National Bank and 240 shares of the capital stock of Central Manufacturing District Bank.

REASONS.

The finding requested was contained in paragraph 18 of the stipulation of facts filed in the case. We believe it was omitted from the report through inadvertence.

3. By striking out the sentence in finding of fact No. 20 reading as follows:

"F. H. Prince & Co. was and is the sole stockholder."

and substituting therefor the following:

F. H. Prince & Co. subscribed to all of the capital stock of Pau Corporation which was and is carried in the name of F. H. Prince & Co. for the benefit of the Maine Company.

REASONS.

The evidence on this point is undisputed and appears on page 364 of the record.

This finding is important because the finding as it stands in the report gives a false and misleading idea as to the status of the Pau Corporation. The petitioner was the equitable owner of the stock of the Pau Corporation, legal title to which was in F. H. Prince & Company. The Pau Corporation was and is an integral part of the stockyards enterprise.

4. By adding at the end of paragraph B of finding No. 22 the following:

The net consolidated assets of $73,322,871.58 and the excess of assets of $40,131,696.50 are taken from the consolidated return of the Jersey Company and its subsidiaries for 1929. Said figures include as assets a net write-up in the assets of the Transit Company amounting to more than Thirteen Million Dollars which was by stipulation between the parties eliminated from the surplus and asset accounts of the Transit Company.

REASONS.

This write-up is dealt with in the first two paragraphs on page 3 of the stipulation of fact filed in this case. As appears from page 3 of exhibit S-4 attached to the stipulation, this was a write-up of capital assets of the Transit Company in 1921. In fairness to the petitioner, any statement of the total assets as shown by books should not omit the fact agreed on by the parties that a very substantial portion of the value of the assets results from a write-up and is eliminated from surplus.

5. By adding at the end of paragraph C, finding No. 22, the following:

Said book value of Forty Million Dollars includes said net-write-up of more than Thirteen Million Dollars referred to above.

REASONS.

Reasons for this addition are the same as the reasons for the addition in paragraph 4.

6. By adding to finding No. 22 a new paragraph lettered D, as follows:

D. On December 31, 1933, the situation was as follows:

The Jersey Company still owned all of the shares of capital stock of the Transit Company, the Railway

Company, the Elevated Company, and the beneficial interest of the District, and filed a consolidated return for 1933, as it did for 1929, which included the operations of the above named wholly owned subsidiaries (including therein the operations of the Harness & Saddlery Company, a subsidiary of the Transit Company) and showed a net income of $77,431.82 for the entire group. The group had outstanding bonds as follows:

Jersey Company 5% bonds maturing 4/1/40	$10,000,000.00
Jersey Company 4% bonds maturing 4/1/40	4,000,000.00
Elevated 4% bonds maturing 3/1/45	2,327,000.00
District bonds maturing on various dates	2,250,000.00
TOTAL	$18,577,000.00
Net consolidated assets	$66,431,231.88
Net consolidated liabilities	29,528,781.93
EXCESS OF ASSETS	$36,902,449.95

Net consolidated assets of $66,431,231.88 and the excess of assets of $36,902,449.95 are taken from the consolidated return of the Jersey Company and its subsidiaries for 1933. Said figures include as assets the net write-up in the assets of the Transit Company amounting to more than Thirteen Million Dollars which was mentioned in paragraph B of finding of fact No. 22.

The Maine Company on December 31, 1933, had bonded indebtedness of $2,620,000.00, which, when added to the bonded indebtedness of the Jersey Company and its subsidiaries, amounted to a total bonded indebtedness of $21,197,000.00 for the entire group. Against this total bonded indebtedness were the following liquid assets:

PETITIONER	
Cash	$ 7,645,235.97
Accounts Receivable	45,285.50
Notes Receivable (Prince)	4,848,000.00
District 5's	30,747.00
Other Investments	1,333,989.27
PRODUCE TERMINAL	
Cash, etc.	111,186.07
TOTAL	$17,829,969.74

In addition to the above, the petitioner and the Jersey Company and its subsidiaries owned fixed and other assets of a book value on December 31, 1933, approximately Five Million Five Hundred Thousand Dollars greater than on December 31, 1929. Such assets on December 31, 1933, include subordinated deposits and investments in the Chicago banks having a book value in excess of Six Million Three Hundred Thousand Dollars.

The entire group of companies at all times material to this case required liquid working capital of at least Five Million Dollars.

REASONS.

The requested finding has been prepared in exactly the same manner, using the same set of figures for 1933 that the Board has used for 1929 in its finding No. 22. The evidence as to the amount of working capital required by the various companies appears in the record at pages 328 and 1110-1111.

The evidence as to the write-up is the same as appears in requested finding No. 4.

The requested finding is material and important because it shows what the net effect of the accumulations has been from 1929 through 1933 and is requested in support of the petitioner's contention, not recognized by the Board as a matter of law, that it was a reasonable business need of the

petitioner to accumulate funds to meet the obligations of the Jersey Company and its subsidiaries in 1940.

7. By adding to finding of fact No. 23 the following:

> At the time the transactions herein set forth were entered into, the petitioner anticipated that such transactions would result in a substantial loss to each of the companies participating in these transactions. By December 31, 1933, it was anticipated that the total loss would exceed $5,000,000; and at the time of trial it appeared that this anticipation was justified.

REASONS.

The evidence supporting the requested additional finding was uncontradicted and appears in the record at pages 273-308.

The requested finding is material in support of the petitioner's contention that the accumulations of earnings during the years in question by the petitioner were reasonable when all circumstances are taken into consideration, including the anticipated losses in the bank situation.

8. By striking out the sentence beginning at the bottom of page 11 of the report and inserting in lieu thereof the following:

> The amount of the debt at the end of each year from 1918 to 1925, inclusive, was as follows:

1918	$3,433,694.35
1919	3,3[illegible]2,448.19
1920	3,362,234.13
1921	1,712,441.52
1922	717,001.28
1923	497,396.64
1924	269,352.26
1925	40,460.37

REASONS.

The above table presents a much fairer picture of the indebtedness of the petitioner to F. H. Prince & Co. than the one contained in the report. The table is taken from figures appearing in S-65 attached as an exhibit to the stipulation of facts agreed upon in this case.

9. By striking out the last paragraph of finding of fact No. 24 in its report and substituting therefor the following:

The loans which the petitioner made to Prince were consistently used by him and his brokerage concern to buy securities of the stockyards corporations in which the petitioner had an interest or to restore to his brokerage firm money which had been expended by it in acquiring such securities, with the exception of one sum of $160,000 which Prince borrowed from the petitioner in 1932 for a short period to finance the purchase of his Newport house until he could sell his North Shore place. The securities which the petitioner loaned to Prince were used by him as collateral to secure loans from banks for the purchase of similar securities. In 1933 the petitioner loaned an amount of approximately $1,000,000 to Prince to enable him to acquire shares of stock of Armour & Co. In that year Prince purchased Armour & Co. common A and B shares and preferred stock at a cost to him of $1,067,389.50. With this acquisition of stock of Armour & Co., Prince became chairman of the Board of Directors of Armour & Co. In 1930 the loans of cash and securities actually decreased by $916,250. Over the four years, 1930-1933, the net amount of cash and securities loaned by the petitioner to Prince was $886,070. Included in this was the loan in 1933 of $1,000,000 which Prince used in the purchase for $1,067,389.50 of the Armour shares. This purchase was made to acquire

control of the Armour stock so that the profitable Armour business would be kept in the stockyards enterprise.

REASONS.

The requested findings are in accordance with the uncontradicted evidence. There was no evidence that "the loans were used by Prince for any purpose desired by him." The purposes of the loans were testified to and the testimony was not contradicted. The purposes distinctly were not "any purpose desired by him" but perfectly definite purposes.

10. By adding to finding No. 34 the following:

All of the securities sold by F. H. Prince & Co. to the petitioner in 1931, 1932 and 1933 were marketable securities; were sold by it to the petitioner at market value. The total of the sale price of such of said securities as were sold by the petitioner and the market value of such as were held by it at the time of the trial exceeded the cost to the petitioner by a substantial amount.

REASONS.

The testimony supporting this finding is clear and uncontradicted. It appears in the record at pages 1126-1129 and in exhibit 47. The petitioner deems it important, as the evidence clearly shows, that it be a part of the findings of fact that the securities which the petitioner purchased from Prince were of a kind which could be turned into cash at a moment's notice and at a price in excess of the amount which the petitioner paid for them.

11. By striking out that portion of finding No. 35, beginning with the sentence "Prince handled the stockyards banking situation from 1930 to 1933" to the end of the finding and substituting the following therefor:

The Maine Company handled the stockyards banking situation from 1930 to 1933. Ultimate choice as to officers, directors, and other personnel was dictated by the Maine Company and it decided dividend policies. It also gave instructions as to the banks in which funds were to be deposited and its authority was necessary for unusual expenditures by the Transit Company. After the destruction of part of the stockyards by fire, the president and vice-president of the Maine Company went to Chicago and gave orders as to what buildings should be rebuilt and how. The yards were not entirely restored. The restoration was paid for with insurance funds received by the Transit Company. In certain instances suggestions of the officers in Chicago were rejected by the Maine Company. In 1933 it refused to permit the Transit Company to spend enough money to build fireproof hog and sheep houses requested by the men in Chicago. It granted permission to rebuild the amphitheatre in which the International Live Stock Exposition was held.

REASONS.

This modification is requested as being in accord with the uncontradicted evidence contained in the record. (Record pages 102-111; 222, 247-252; 313-316.)

It is true that at times the statement is made by witnesses that decisions were made by Mr. Prince, but it is submitted that such statements, with their context, offer no warrant for the Board's finding that Mr. Prince, in giving orders or taking actions touching the subsidiaries of the Jersey Company and the Produce Terminal Corporation was acting in any capacity other than that of president of the Maine Company or that his authority to control the

matters was recognized as being other than that of the president of the Maine Company.

12. By striking out the first sentence of finding of fact No. 41 and substituting therefor the following:

> During the years 1930-1933, inclusive, and prior thereto the principal activity of the petitioner was the purchase and holding of securities, primarily securities of the Jersey Co., the collection of dividends thereon, the management of the Jersey Co. and its subsidiaries, and the management of the Produce Terminal Corporation. During this period these activities included the supervision and direction by the Maine Company of the investment of more than $10,000,000 by the Maine Company, the Produce Terminal Corporation, the District, and The Transit Company, in Chicago banks connected with the stockyards, in a successful effort to prevent the business of the stockyards from being injured by the failure of these banks. During this same period another activity of the petitioner was the lending of money to F. H. Prince and his brokerage concern for the purpose of putting them in funds so that they might purchase securities for the benefit of the petitioner.

REASONS.

Finding of fact No. 41, as contained in the report, is incomplete in that it fails to include the very important activity of the Maine Company during the years in question in connection with the salvaging of the Chicago banks—an activity so vital to the continued success of the stockyards. The finding of fact, as contained in the report, is also misleading and at variance with the facts in respect to the loans. In connection with the loans, reference is made to paragraph 9 of this Motion. It is highly inaccurate to find that the principal activity of the petitioner in the

year 1930 was "the lending of money to F. H. Prince", since in that year the loans to F. H. Prince in fact diminished. Furthermore, in other years all such loans as were made were to further the interest of the petitioner, with the exception of the loan of $160,000 which has been referred to in paragraph 8 of this Motion.

13. By making an additional finding of fact as follows:

The experts called in by the petitioner (two in number) and the experts called in by the respondent (three in number) were unanimous in the opinion that it was sound business policy to liquidate the Jersey Company in 1940.

REASONS.

The testimony supporting this finding was undisputed. Mr. Blough, a witness for the petitioner, testified to this effect (R., pp. 509-510). Mr. Walker, a witness for the petitioner, testified to this effect (R., pp. 630-631). Mr. Merriman, an expert called by the respondent, testified to this effect in cross-examination (R., p. 830). Mr. Atkins, an expert called by the respondent, testified to this effect in cross-examination (R., pp. 1035-1039). Dr. Friday, an expert called by the respondent, testified to this effect in direct (R., p. 1032). These witnesses were businessmen or economists and there were no other opinion witnesses.

The requested finding is material in support of the petitioner's contention, not recognized by the Board as a matter of law, that it was a reasonable business need of the petitioner to accumulate funds to meet the obligations of the Jersey Company and its subsidiaries in 1940 which would have to be met upon liquidation of the Jersey Company.

14. By making additional finding of fact as follows:

At all material times it was sound business policy for the petitioner to plan to liquidate the Jersey Company in 1940.

REASONS.

The reasons for requesting this finding are identical with those stated in respect to requested finding 13.

15. By making an additional finding of fact as follows:

The petitioner was not formed for the purpose of preventing the imposition of the surtax on its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

REASONS.

While this appears in the Board's opinion, it should appear as a finding of fact as well.

16. By making an additional finding of fact, as follows:

From the time when the petitioner was formed, the petitioner contemplated the liquidation of the Jersey Company upon the expiration of its charter on July 10, 1940. With that end in view, shortly after its formation the petitioner began to accumulate earnings. Out of the earnings so accumulated the petitioner purchased as many shares of the Jersey Company common stock as became available from time to time at reasonable prices.

REASONS.

The formation of the plan was testified to by Mr. Prince (R., pp. 410-413; 423-424). See also the testimony of other witnesses as to the existence of the plan (R., pp. 109-110; 257; 320-321; 323; 328; 288; 631). That the plan was acted upon appears in finding No. 33 of the Board's report.

The evidence supporting this finding was uncontradicted and there is no dispute as to these facts. The requested finding is material because the tax is based on purpose and the purpose for which accumulations took place is material.

17. By making an additional finding of fact, as follows:

The purpose of the petitioner in accumulating earnings during the years 1930 to 1933, inclusive, as well as prior thereto, was to acquire sufficient liquid assets to purchase all Jersey Company common stock that could be purchased before 1940 at a reasonable price, to pay off all of the bonds of the petitioner and of the Jersey Company and its subsidiaries by 1940, and to pay off all the outstanding preferred stock of the Jersey Company in 1940.

This plan, as at the close of the year 1929, contemplated an accumulation of cash and liquid assets in the treasury of the petitioner, its subsidiary, Produce Terminal, and the Jersey Company and its subsidiaries, of approximately $36,000,000 divided as follows:

Total bonded indebtedness	$23,963,000.00
Preferred stock Jersey Company (64,543 shares)	6,454,300.00
Common stock Jersey Company (6,258 shares)	1,034,134.50
Working capital	5,000,000.00
Total	$36,451,434.50

REASONS.

This requested finding appears in substance in the Board's opinion on pages 30, 31, 32. While the Board states that it is its opinion that the petitioner had no reasonable business need to formulate or carry out such a plan, the petitioner is entitled to have the existence of the plan found as a fact.

The evidence as to the existence of the plan was uncontradicted. Its existence was not questioned by the Government. The attack on the plan was simply and solely that the plan was not one within the reasonable needs of the petitioner.

The figures referred to in the requested finding are taken from the opinion of the Board on page 31.

18. By making an additional finding of fact as follows:

During the years 1922-1933, inclusive, the petitioner withdrew from the Jersey Company and its subsidiaries in dividends more than the net earnings of the Jersey Company and its subsidiaries for that period available for distribution to the petitioner.

REASONS.

This requested finding is based on undisputed evidence and appears graphically in exhibit 40. Testimony as to how exhibit 40 was prepared appears in the record, pages 524-543. This requested finding is material and is important since it strongly negatives any intention to accumulate earnings in the Maine Company to avoid the imposition of a surtax on its shareholders. The simple method to have obtained that result would have been to retain earnings of the enterprise at the level of the Jersey Company to meet its debts or below that level in the operating companies. For example, in 1933, as appears in finding of fact No. 29 contained in the report, the Transit Company had a loss of over $800,000, but paid dividends which found their way to the Maine Company amounting to $1,716,000. If the forbidden purpose had been in the mind of the petitioner, the Transit Company surely would have paid no dividends in 1933.

19. By striking out finding of fact No. 44 and substituting therefor the following:

During the years 1930, 1932 and 1933, the petitioner was not a mere holding or investment company.

REASONS.

The finding as it appears in the report is against the evidence, the weight of evidence, and is contrary to law.

20. By striking out finding of fact No. 45 and substituting therefor the following:

> During the years 1930, 1932 and 1933, the petitioner did not permit its gains and profits to accumulate beyond the reasonable needs of its business.

REASONS.

The finding in the report is against the evidence, the weight of the evidence, and is contrary to law.

21. By striking out finding of fact No. 46 and substituting therefor the following:

> During the years 1930, 1932 and 1933, the petitioner was not availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

REASONS.

The finding in the report is against the evidence, the weight of evidence, and is contrary to law.

The petitioner requests that it be heard orally on this motion.

JOSEPH N. WELCH,
60 State Street,
Boston, Massachusetts.

SWAGAR SHERLEY,
730 15th Street, Northwest,
Washington, D. C.,
Counsel for Petitioner.

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 83797.

CHICAGO STOCK YARDS COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

MOTION FOR FURTHER HEARING.

Now comes the petitioner in the above entitled case and moves that the Board grant a further hearing in this case to the extent that the Board shall set the case down for oral argument by counsel for the petitioner and the respondent before the full Board or a division of the Board.

REASONS FOR MOTION.

This case has now been decided by a majority of the Board upon findings of fact and opinion prepared and filed by Honorable C. P. Smith, Member. Counsel therefore find themselves faced with findings of fact and an opinion prepared by a Member of the Board who did not have the opportunity to hear the witnesses and observe their demeanor on the stand, and did not have the opportunity to listen to oral arguments by counsel. The record is long and the exhibits extraordinarily voluminous. Evidence as to the ultimate question of intent is at widely separated points in the transcript and in the exhibits. It is not even probable that the attention of the Member of the Board who prepared the findings of fact and the ma-

jority opinion could have been called to all the evidence bearing on the question of intent and it is certainly highly improbable that the force of that evidence could have been made as clear to such Member from a reading of the record and exhibits alone as it could be made upon oral argument.

The ultimate question in the case is one of the intent which governed the activities of the Maine Company during the years 1930 to 1933. A search through written words and figures, however painstaking, is at best a poor substitute for an actual observation of the witnesses on the stand, listening to their words as to the intent which led to the formulating of the business policies of the petitioner. The full Board did not hear the witnesses or observe them. But the full Board, or a division, at least, if this motion be granted, can hear argument which, while a poor substitute for live witnesses, is an improvement over searching for intent in a mass of written words and figures.

As the case stands, if the present findings of fact and opinion are to remain the findings of fact and the opinion of the Board, counsel for the petitioner has not had a "hearing" in the full sense of that word and cannot have had such a "hearing" unless this motion be granted.

The petitioner respectfully requests that it be heard orally on this motion.

JOSEPH N. WELCH,
60 State Street,
Boston, Massachusetts.

SWAGAR SHERLEY,
730-15th Street, Northwest,
Washington, D. C.,
Counsel for Petitioner.

[Title omitted.]

MOTION FOR REHEARING AND FURTHER HEARING.

[April 18, 1940.]

Now comes the petitioner in the above entitled case and moves for a rehearing and for a further hearing on the grounds of newly discovered evidence; and in support of such Motion attaches hereto the affidavit of James A. McDonough setting forth the substance of the newly discovered evidence.

REASONS IN SUPPORT OF MOTION:

When the case was tried in February 1939 the evidence could not go beyond the point that it was and always had been the plan of the petitioner to liquidate the Jersey Company in 1940 and to accumulate funds for that purpose. During the period of time that has elapsed between the trial of the case and the promulgation of the Board's report on March 20, 1940, those plans have been so far advanced and such important and conclusive action leading up to such liquidation taken that evidence may now be offered showing that the liquidating of the Jersey Company is now fully embarked upon and has been removed from the field of a mere plan as was testified to at the trial into the field of reality.

The Board, in its report promulgated March 20, 1940, gave no effect to the testimony of the witnesses for the petitioner who testified that the primary purpose of accumulating surplus in the Maine Company was that of effecting the liquidation of the Jersey Company on the expiration of its charter in 1940. The Board apparently took this course for either one of two reasons, or both:

First, because as a matter of law the Board believed that

it was not a reasonable business need of the petitioner to accumulate funds to provide the amount required to carry out the liquidation of the Jersey Company (Report, pp. 30-32), or

Second, because the Board did not believe the testimony of the petitioner's witnesses who testified that the liquidation would in fact take place (Report pp. 35-36).

The newly discovered evidence which the petitioner seeks to introduce upon a rehearing bears upon the second reason and clearly demonstrates that the Board's reason for rejecting such testimony was based on a hypothesis which is contrary to uncontrovertible facts. This evidence was not in existence or available to the petitioner at the time of the trial in February 1939 but has come into existence and become available since that time. In view of the Board's expressed belief, it is of critical and decisive importance consisting as it does of direct and positive evidence based entirely upon facts which cannot be controverted of the intent with which the petitioner's surplus was accumulated. A final decision of the case without the receipt of such evidence would result in a decision being reached purely upon the basis of hypothesis in contrast to a solid basis of fact and without the Board having before it the most cogent evidence on the issue of intent that could possibly be offered.

The petitioner respectfully requests that it be heard orally on this motion.

(s) Joseph N. Welch,
60 State Street,
Boston, Massachusetts.

(s) Swagar Sherley,
730-15th Street, Northwest,
Washington, D. C.
Counsel for Petitioner.

[Title omitted.]

AFFIDAVIT OF JAMES A. McDONOUGH IN SUPPORT OF PETITIONER'S NOTICE MOTION FOR REHEARING AND FURTHER HEARING.

James A. McDonough, being first duly sworn, deposes and says as follows:

I am a Director, Vice President and Executive Officer of Chicago Stock Yards Company (hereinafter called the Maine Company), and I am Vice President and Executive Officer of the Chicago Junction Railways and Union Stock Yards Company (hereinafter called the Jersey Company).

For many years I have been actively engaged in making plans and financial arrangements looking toward the liquidation of the Jersey Company on the expiration of its charter on July 10, 1940. Since January 1, 1939 substantially all of my time has been devoted to this problem.

During 1939 and continuing in 1940 the Maine Company has continued its policy of acquiring securities of the Jersey Company for the purpose of owning 80% of the voting stock of that company by July 10, 1940 so that the Jersey Company may be liquidated tax free under I. R. C. Sec. 112 (b) (6). Between the trial and the date of this affidavit the Maine Company acquired 290 shares of common stock of the Jersey Company and 29,342 shares of preferred stock of the Jersey Company for that purpose both of which classes of stock have full voting rights. As of the date of this affidavit the Maine Company had acquired and owned 64,656 shares of Jersey common and 31,563 shares of Jersey preferred and more stock was steadily being purchased.

During the last half of 1939 and continuing until the present time I have been in active negotiations with finan-

cial institutions with a view to securing a loan of $14,000,000 to the Maine Company with a view to combining the proceeds of such loan with the liquid assets of the Maine Company and the Jersey Company for the purpose of discharging the obligations of the Jersey Company and retiring its preferred stock and liquidating its common stock. These negotiations are still continuing and are at the moment in a very active stage.

At a meeting of the Board of Directors of the Jersey Company held at the agency of the company, Room 3722, 70 East 45th Street, New York City, on March 12, 1940 the following votes were passed:

Voted: That this Company declare out of surplus earnings applicable to dividends, two quarterly dividends, each in the sum of 1½% per share, on the 65,000 shares of outstanding preferred stock of the company, such quarterly dividends to be payable April 1, 1940 and July 1, 1940 respectively to preferred stockholders of record of the Company at the close of business on March 15, 1940; and that the Treasurer be instructed to transmit the full amount of both quarterly dividends (aggregating $195,000 for both dividends) to Old Colony Trust Company to be by it paid, when the respective dividends become payable, to the preferred stockholders of record of this Company at the close of business on March 15, 1940.

Voted: That the Treasurer of this Company be instructed to request Chicago Junction Railway Company to forward $330,000 to Guaranty Trust Company of New York on March 15, 1940 to cover interest payable April 1, 1940 on this Company's $14,000,000 principal amount of bonds secured by its mortgage dated April 10, 1900 as amended.

Voted: That Guaranty Trust Company of New York

be requested and directed to apply all cash ($2,675,000) held by it, as Trustee under the Company's mortgage dated April 10, 1900 as amended, to the payment on April 1, 1940 of the principal of this Company's $14,000,000 principal amount of bonds then due secured by such mortgage as amended and maturing April 1, 1940; and further

Voted: That Guaranty Trust Company of New York be requested and directed to apply all cash ($4,145,000) held by it, as Trustee under three trust agreements between this Company and Guaranty Trust Company of New York dated respectively December 20, 1937, December 27, 1938 and December 13, 1939, to the payment on April 1, 1940 of the principal of this Company's $14,000,000 principal amount of bonds secured by its mortgage dated April 10, 1900 as amended and maturing April 1, 1940; and further

Voted: That this Company borrow $4,000,000 from Guaranty Trust Company of New York and give therefor this Company's collateral note in the usual form due three months from the date thereof with interest at the rate of 1½% per annum, plus the usual premium for the privilege of anticipating maturity, secured by the 151,084 shares of the capital stock of The Union Stock Yards and Transit Company of Chicago and the 54,994 shares of the capital stock of Chicago Junction Railway Company now pledged under this Company's mortgage dated April 10, 1900 as amended; and that, upon receipt by this Company of such $4,000,000, the Treasurer of this Company be authorized and directed, in the name and on behalf of this Company, to execute and deliver such collateral note and the collateral therein described to Guaranty Trust Company of New York, and to deposit such $4,000,000 with Guaranty

Trust Company of New York, as Trustee under this Company's mortgage dated April 10, 1900 as amended, to be by such Trustee applied on April 1, 1940 to the payment of the principal of this Company's $14,000,000 principal amount of bonds secured by such mortgage as amended and maturing April 1, 1940; and further

Voted: That this Company borrow $1,000,000 from Chicago Stock Yards Company and give therefor this Company's unsecured note due three months from the date thereof with interest at the rate of 1½% per annum; and that, upon receipt by this Company of such $1,000,000, the Treasurer of this Company be authorized and directed, in the name and on behalf of this Company, to execute and deliver such unsecured note to Chicago Stock Yards Company and to deposit such $1,000,000 with Guaranty Trust Company of New York, as Trustee under this Company's mortgage dated April 10, 1900 as amended, to be by such Trustee applied on April 1, 1940 to the payment of the principal of this Company's $14,000,000 principal amount of bonds secured by such mortgage as amended and maturing April 1, 1940; and further

Voted: That the Treasurer of this Company be authorized and directed to draw from this Company's free cash and to deposit with Guaranty Trust Company of New York, as Trustee under this Company's mortgage dated April 10, 1900 as amended, $2,180,000 to be by such Trustee applied on April 1, 1940 to the payment of the principal of this Company's $14,000,000 principal amount of bonds secured by such mortgage as amended and maturing April 1, 1940; and further

Voted: That the Treasurer of this Company be authorized and directed, in the name and on behalf of this

Company, to execute and deliver all instruments, pay all amounts and perform all acts that may be necessary or proper (a) to discharge all obligations of this Company under its mortgage dated April 10, 1900 as amended, including all payments due the holders of the bonds and the Trustee thereunder and (b) to effect the discharge of such mortgage as amended; and (c) to free from the lien of such mortgage as amended all shares of stock of The Union Stock Yards and Transit Company of Chicago and of Chicago Junction Railway Company pledged thereunder.

The purpose of the first of the foregoing votes was as follows:

Large blocks of preferred stock of the Jersey Company are held by trustees. The Maine Company was purchasing such stock so that the Maine Company might own 80% of the voting stock of the Jersey Company, by offering to such trustees par plus an amount equal to dividends which would accrue on the preferred stock from the last prior dividend date to the date of liquidation, namely, July 10, 1940. Resistance was encountered because trustees felt that if they sold their preferred shares upon such a basis they would have difficulty in determining how much, if any, of the sales price was income which would be available to beneficiaries of their trusts who were entitled to income. They felt that they would prefer to hold their stock and receive dividends and the liquidating value in normal course. To the end that it might be possible to purchase such stock from such trustees at a date substantially before July 10, 1940, the foregoing vote was passed which provided that all preferred stock should be ex all dividends on March 15, 1940 so that at any date thereafter a preferred shareholder could receive par for his stock and he would receive dividends in the form of dividends in normal course if he held

his stock on that date; such dividends being income for the beneficiaries of income.

As a result of this vote trustees who were unwilling to sell their stock prior to March 15, 1940 to the Maine Company have since made such sales in substantial amounts.

On February 2, 1940 the Directors of the Jersey Company passed the following resolution:

> Resolved: That the officers of this Company be and they are hereby instructed to prepare the annual report of the Company for 1939 and mail the same to stockholders of record February 20, 1940 as soon as possible after that date.

In accordance with this resolution the Forty-Ninth Annual Report of the Jersey Company was mailed on March 12, 1940 to all stockholders of record. A copy of this report is attached to and made a part of this affidavit. For convenience the last paragraph of said report is quoted below:

> "The period for which the Company was organized to carry on business expires by limitation on July 10th, 1940. After July 10th, 1940, the Company will continue as a corporation for the purpose of liquidating its affairs and dividing its capital, but not for the purpose of continuing the business for which it was established."

On March 14, 1940 there appeared in Standard Corporation Records the following notice:

> "TWO QUARTERLY DIVIDENDS DECLARED ON PREFERRED—Directors of company declared two quarterly dividends of $1.50 a share each on 5% preferred stock, one payable April 1 and the other July 1, both to holders of record March 15, 1940.
>
> "This was in accordance with plans to liquidate the company and these dividends constituted final pay-

ments to be made on preferred. Purchasers of stock after March 15, 1940, thus would be entitled only to $100 a share in liquidation."

On March 27, 1940 the Directors of the Maine Company passed the following votes:

Voted: That this corporation offers to loan $5,000,000 to The Chicago Junction Railways and Union Stock Yards Company, on or before April 1, 1940, on the following terms:

1.—The borrower will give its collateral note in the usual form for the principal sum of the loan, such collateral note to mature December 31, 1941 subject to the borrower's option to anticipate payment, to bear interest at 1½% per annum until July 10, 1940 and thereafter at 3% per annum, and to be secured by 132,000 shares of the capital stock of The Union Stock Yards and Transit Company of Chicago and 55,000 shares of the capital stock of Chicago Junction Railway Company.

2.—This corporation will accept, in full payment of the principal of the collateral note, shares of stock of The Union Stock Yards and Transit Company of Chicago and of Chicago Junction Railway Company at their fair value at the time such principal amount is repaid.

3.—This corporation may, at its option, repledge as security for loans now or hereafter made to it, all or any part of the shares of The Union Stock Yards and Transit Company of Chicago and or Chicago Junction Railway Company: PROVIDED that the amount of loans to this corporation, as security for which such shares are repledged, shall not exceed the amounts loaned by this corporation to The Chicago Junction Railways and Union Stock Yards Company; and PRO-

VIDED, FURTHER, that the maximum number of such shares so repledged shall not exceed that fractional part of all outstanding stock of The Union Stock Yards and Transit Company of Chicago and of Chicago Junction Railway Company, respectively, that equals the fractional part of outstanding common stock of The Chicago Junction Railways and Union Stock Yards Company at the time owned by this corporation; and further

Voted: That the Vice-President be empowered to take all action by him deemed necessary or proper to carry out the purpose and intent of the foregoing vote.

On March 27, 1940 the Directors of the Jersey Company passed the following votes:

Voted: That all votes relating to the payment of the principal of this Company's bonds secured by its mortgage dated April 10, 1900 as amended which were passed by the Directors of this Company at their meeting held March 12, 1940, be rescinded; and further

Voted: That this Company accepts the offer of Chicago Stock Yards Company to loan it $5,000,000 upon the terms set forth in the vote above set forth in these minutes this day passed by Chicago Stock Yards Company, and authorizes and directs the Treasurer of this Company to effect such loan on the terms in such vote set forth.

Voted: That the Treasurer of this Company, on or before April 1, 1940, deposit $7,180,000 with Guaranty Trust Company of New York, as Trustee under this Company's mortgage date April 10, 1900 as amended, with instructions that the Trustee apply the same, together with cash in the sum of $2,675,000 now held by Guaranty Trust Company of New York as such Trustee and cash in the sum of $4,145,000 now held by Guaranty Trust Company of New York as Trustee under three

trust agreements dated respectively December 20, 1937, December 27, 1938 and December 13, 1939, to the payment on April 1, 1940 of the principal ($14,000,000) of this Company's bonds secured by such mortgage and then maturing.

Voted: That the Treasurer of this Company be authorized and directed, in the name and on behalf of this Company, to execute and deliver all instruments, pay all amounts and perform all acts that may be necessary or proper to discharge all obligations of this Company under its mortgage dated April 10, 1900 as amended and to effect the discharge of such mortgage as amended and to free from the lien of such mortgage as amended all shares of stock of The Union Stock Yards and Transit Company of Chicago and of Chicago Junction Railway Company pledged thereunder.

On March 27, 1940 the Jersey Company borrowed from the Maine Company the sum of $5,000,000 the proceeds of such loan to be devoted to the liquidation of the Jersey Company and on that date the Jersey Company gave its note payable to the Maine Company in said sum.

On March 30, 1940 the Jersey Company delivered to the Guaranty Trust Company of New York, the Trustee under its bond mortgage, certified checks totaling $7,180,000 together with a letter reading as follows:

"March 30, 1940

"In re: The Chicago Junction Railways and Union Stock Yards Company Mortgage and Deed of Trust dated April 10, 1900 under which its Four Per Cent Forty Year Mortgage and Collateral Trust Refunding Gold Bonds due April 1, 1940 and its Five Per Cent Forty-Year Mortgage and Collateral Trust Refunding Gold Bonds due April 1, 1940 were issued.

Guaranty Trust Company of New York, as Trustee,
140 Broadway,
New York, N. Y.

Gentlemen:—

We deliver to you herewith our certified checks for $7,180,000 to your order, the proceeds of which, together with the balance of $2,675,000 in the Trustee Account under the above Indenture, and the $4,145,000 held by you under our Letters of Instruction dated December 20, 1937, December 27, 1938 and December 13, 1939, you are instructed to apply to the redemption on and after April 1, 1940 of the bonds described above. These funds, aggregating $14,000,000, are deposited with you as Trustee in trust to be held by you for the sole purpose of paying said bonds.

We hand you herewith two copies of a discharge of mortgage pertaining to the mortgage described above, which we request that you execute and deliver in two counterparts.

In connection with our request for the execution of a discharge of the mortgage, we hand you herewith agreement dated March 27, 1940, indemnifying you against liability on account of such satisfaction, and also a certified copy of a resolution of the Board of Directors of this Company adopted March 27th, 1940 authorizing the request for satisfaction of the mortgage and the execution of the indemnity agreement.

Please deliver the collateral held under the above mortgage to undersigned Vice President.

Yours very truly,

THE CHICAGO JUNCTION RAILWAYS AND
UNION STOCK YARDS COMPANY

JAMES A. McDONOUGH
Vice President"

The instructions contained in this letter were carried out on or about April 1, 1940.

The Jersey Company caused the Old Colony Trust Company to enclose to all preferred stockholders of the Jersey Company with the April 1, 1940 dividend checks to such stockholders the following notice:

"IMPORTANT

"To the Holders of Preferred Stock of The Chicago Junction Railways and Union Stock Yards Company:

The charter of this Company expires on July 10, 1940. Accordingly, the directors of this Company declared two dividends of 1½% each on its preferred stock, payable on April 1 and July 1 to preferred stockholders of record on March 15, 1940. These are the final dividends on preferred stock which this Company will pay before the above-mentioned expiration date.

On July 10, 1940, the holders of preferred shares will also become entitled to ten days' interest from July 1 to July 10 at six per cent, or 16⅔ cents per share, plus par ($100 per share) in liquidation; and on and after that date, OLD COLONY TRUST COMPANY, 17 Court Street, Boston, Massachusetts, will pay you par ($100 per share) plus 16⅔ cents per share for each share of preferred stock of this Company which you deliver to it properly executed.

Any preferred stockholder desiring to dispose of his preferred shares at the same price ($100.16⅔ per share) before July 10, 1940, may do so by delivering his certificates therefor duly endorsed for transfer to THE FIRST BOSTON CORPORATION, 1 Federal Street, Boston, Massachusetts, prior to July 10, 1940. This will give present preferred shareholders the opportunity to reinvest the proceeds between now and July 10.

CHICAGO JUNCTION RAILWAYS AND
UNION STOCK YARDS COMPANY.

April 1, 1940"

/s/ James A. McDonough

The Commonwealth of Massachusetts
Suffolk, ss.

Subscribed and sworn to before me this 12th day of April, 1940.

/s/ Josephine A. Kraft
Notary Public.

My Commission Expires: March 24, 1945.

[Notarial Seal.]

[Title omitted:]

DIRECTORS: Francis B. Keeney, Providence, R. I., Weymouth Kirkland, Chicago, Ill., Arthur G. Leonard, Chicago, Ill., James A. McDonough, Boston, Mass., Bradford Norman, Jr., Newport, R. I., Mark W. Potter, New York City, Joseph W. Powell, Boston, Mass., Frederick H. Prince, Newport, R. I., Charles B. Wiggins, New York City.

OFFICERS OF THE COMPANY: *President*, Frederick H. Prince; *Vice-Presidents*, James A. McDonough, Mark W. Potter; *Secretary and Treasurer*, James A. McDonough; *Auditors*, Martin, Johnson & Co., Certified Public Accountants, Chicago.

THE CHICAGO JUNCTION RAILWAYS
and
UNION STOCK YARDS COMPANY

15 Exchange Place, Jersey City, N. J.

FORTY-NINTH ANNUAL REPORT SUBMITTED TO THE STOCKHOLDERS AT THE ANNUAL MEETING, MARCH 12TH, 1940.

Jersey City, N. J., March 12th, 1940.

TO THE SHAREHOLDERS:

Herewith is submitted the annual report of the operations of the properties for the year ended December 31st, 1939, which embodies a combined statement of the earnings of the Union Stock Yard & Transit Company, the Chicago Junction Railway Company and of your Company for the years 1930 to 1939, inclusive.

A comparative statement of the annual gross and net earnings of the Transit Company, the Railway Company and the New Jersey Company for the years ended December 31st, 1930, to December 31st, 1939, is as follows:

Year	Gross	Taxes, Interest and Operating Expenses	Net
†1939	$5,662,472.82	$3,274,920.10	$2,387,552.72
1938	5,577,775.09	3,265,028.12	2,312,746.97
1937	5,701,208.07	3,063,459.12	2,637,748.95
1936	5,479,954.86	2,799,671.90	2,680,282.96
*1935	5,104,300.90	2,679,902.44	2,424,398.46
*1934	5,560,460.01	3,020,290.74	2,540,169.27
*1933	5,489,824.67	3,091,631.82	2,398,192.85
*1932	5,515,167.16	3,610,236.39	1,904,930.77
*1931	6,004,335.17	3,883,557.36	2,120,777.81
*1930	6,028,915.83	3,859,994.64	2,168,921.19

† Exclusive of profit on sale of $2,500,000. Indiana Harbor Belt R. R. 4% Bonds.
* Exclusive of earnings from real estate investments.

The following is a Comparative Statement of the Live Stock and Car Receipts for the two years ending, respectively, December 31st, 1938, and December 31st, 1939:

	Cattle	Calves	Hogs	Sheep	Horses	Cars By Rail	No. of Trucks
1939	1,818,494	312,052	4,263,810	2,498,869	7,948	81,193	147,816
1938	1,884,553	325,143	4,188,055	2,563,807	8,866	88,386	135,407
Increase			75,755				12,409
Decrease	66,059	13,091		64,938	918	7,193	

The Total Number of all Animals received during the Year 1939 was 8,901,173, as compared with 8,970,424 during the Year 1938, a Decrease of 69,251 head of live stock.

The Total Valuation of all animals received for 1939 was $249,463,937, compared with a Valuation of $256,616,763 for 1938, a Decrease of $7,152,826.00.

During the year 1939, $2,500,000 Indiana Harbor Belt R. R. Co. 4% bonds, pledged with the Trustee of the Company's Mortgage to secure its bonds due April 1st, 1940 and carried on the Company's books at $50,000, were sold for $2,675,000. The proceeds of the sale were deposited with the Trustee under the Mortgage. The Company also continued the plan of setting aside in irrevocable trust not less

than $1,215,000 in each of the years 1937 to 1939, inclusive, to retire its bonds. The amount so set aside in 1939 was $1,715,000, making a total set aside to date of $4,145,000, as appears from the annexed balance sheet.

The period for which the Company was organized to carry on business expires by limitation on July 10th, 1940. After July 10th, 1940, the Company will continue as a corporation for the purpose of liquidating its affairs and dividing its capital, but not for the purpose of continuing the business for which it was established.

By order of the Board of Directors.

FREDERICK H. PRINCE,
President.

THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY

BALANCE SHEET DECEMBER 31ST, 1939

ASSETS.

Investment Account:		
132,000 Shares Capital Stock of the Union Stock Yard and Transit Co., 55,000 Shares Capital Stock of the Chicago Junction Railway Co., and other investments		$28,384,736.92
Interest and accounts receivable:		611,184.04
Cash at bankers:		
Cash in Banks	$2,064,497.10	
Collateral Trust Gold Bonds (due 1915), Coupon Account	122.92	
Mortgage and Collateral Trust Refunding Gold Bonds, Coupon Account	8,305.00	
Cash on hand—New York Office	14.00	2,072,939.02

Bond retirement fund:		
Guaranty Trust Co.—New York	$4,145,000.00	
Guaranty Trust Co.—New York (Realized from Sale of Collateral)	2,675,000.00	6,820,000.00
		$37,888,859.98

LIABILITIES.

Capital stock:		
65,000 shares preferred, par $100	$6,500,000.00	
65,000 shares common, par $100	6,500,000.00	
		$13,000,000.00
Four per cent. forty year mortgage and collateral trust refunding gold bonds (deed of trust dated April 10, 1900) $10,000,000 issued at 5% under supplemental Trust Deed, dated April 1, 1915		14,000,000.00
Interest accrued on mortgage and collateral trust refunding gold bonds		165,000.00
Unpaid dividend vouchers		43.00
Unpaid coupons		8,430.000
Taxes payable		18,824.38
Reserve:		
Bond retirement		4,145,000.00
Surplus		6,551,175.00
		$37,888,859.98

CONTINGENT LIABILITIES.

Bonds guaranteed as to principal and interest:	
Chicago Junction Railroad Co., 4% Bonds (due March 1, 1945)	$2,327,000.00

This Balance Sheet does not contain any provision for 1939 Federal Income Taxes.

AUDITOR'S CERTIFICATE.

We have audited the Accounts of The Chicago Junction Railways and Union Stock Yards Company for the year ended December 31st, 1939, and hereby certify that, in our opinion, the above Balance Sheet, with accompanying comment, correctly sets forth the financial position of the Company, as at December 31st, 1939.

MARTIN, JOHNSON & Co.
Certified Public Accountants,
Chicago, Illinois.

[Title omitted.]

REPORTER'S MINUTES

[Filed July 30, 1940.]

Hearing at Hearing Room No. 2, Internal Revenue Building, Washington, D. C., on the 18th day of July, 1940, at 10:00 o'clock A.M.

The above-entitled proceeding came on for hearing on this the 18th day of July, 1940, before the Honorable Charles P. Smith, the Honorable John W. Kern, and the Honorable Clarence V. Opper, Members of the United States Board of Tax Appeals, at Washington, D. C., pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had and testimony heard, to wit:

Appearances:

Joseph N. Welch, Esq., Edward J. Keelan, Esq., Lawrence E. Green, Esq. (Hale & Dorr, 60 State Street, Boston, Mass.)

Joseph K. Moyer, Esq. (1343 H Street, N.W., Washington, D. C.), and

Francis B. Keeney, Esq. (Swan, Keeney & Smith, 1310 Turks Head Building, Providence, R. I.)

appearing on behalf of the Petitioner.

Stanley B. Pierson, Esq., and Philip M. Clark, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

PROCEEDINGS

The Clerk: The Honorable Charles P. Smith, the Honorable John W. Kern, and the Honorable Clarence V. Opper, presiding in Docket No. 83797, the Chicago Stock Yards Company.

For the Petitioner, Mr. Joseph N. Welch, Mr. Joseph K. Moyer, Francis B. Keeney, Edward J. Keelan, Jr., and Lawrence E. Green.

For the Respondent, Mr. Philip M. Clark and Stanley B. Pierson.

Member Smith. I would like to ask first, what is your intention with respect to this motion for further hearing?

Mr. Welch: That is the motion which I wish to argue first, if Your Honor please, and we will deal with the other motions at the conclusion of my argument on that motion. And also at the outset I am presenting with Your Honor's permission, a motion for leave to file an additional affidavit of James A. McDonough.

Your Honors will all remember that there was an affidavit in the file in connection with the motion for a re-hearing, and further re-hearing, the purport of the additional affidavit being simply to bring the liquidation of the Jersey Company up to date, and to show that as of today it actually is in liquidation, and has ceased to do business.

The affidavit was drawn at the last possible moment to show as much as we could in the development of that liquidation, and a copy of it was furnished to the government counsel two or three days ago. I have the original motion here, and I have several printed copies of the affidavit.

I would like to present the motion, and it is my hope that we may have leave to file the additional affidavit at this time, and I am not sure that it is opposed by government counsel.

Member Smith: Is there any objection to the affidavit being received?

Mr. Clark: I merely want to state that I understand this is purely supplementary to what already has been filed, and

of course its consideration would be in conjunction with what has already been offered.

Member Smith: That is with respect to which motion?

Mr. Welch: The motion for re-hearing, and further hearing, that is the heading that it has on it. I have printed only the affidavit that is attached to the motion, since that is the only thing that is of importance.

I will say with respect to the affidavit, this additional affidavit, that while it is not long, the substance of it is, as I have stated, that it shows that the Jersey Company now is in liquidation, that eight days ago it ceased to do business, and that its Directors are now Trustees merely for the purpose of winding up its affairs and distributing its assets.

Mr. Green thinks that perhaps there was a misunderstanding.

Member Smith: How much time would you suggest that you would like to take?

Mr. Welch: I think that I have the reputation of being moderately brief. My guess is that I will not be more than an hour. I would hope to be somewhat less, but I should think that I would be an hour.

Member Smith: You may have that time.

Mr. Clark: May I ask if that has reference to your argument on this one motion?

Mr. Welch: That is my total time.

Mr. Green suggests to me that there may have been a faint misunderstanding between you and me as to what motion I am arguing first. I am arguing first the motion that has on its cover the "Motion for Rehearsing and Further Hearing," to which the McDonough affidavit is attached. I am arguing that the case should be reopened merely to the extent of hearing the new evidence developed

since the original trial, in respect to the fact that the Jersey Company is now being liquidated.

I don't think it is necessary for me to say that the new evidence which the petitioner seeks to introduce is important evidence. It was the petitioner's case throughout the long trial that its gains and profits were permitted to accumulate for the purpose of liquidating the Jersey Company when its charter expired in 1940. Of course, as we tried the case in this court room we could only talk about plans and hopes. Now that the liquidation has become a reality, and is in fact substantially and practically accomplished, certainly no words of mine are necessary to show that the evidence we seek to introduce is important.

It seems to me that it is not only important but almost decisive because if this Board would find now, as I think it must when this evidence is introduced, "Yes, it is now clear to us that it was always the intent to liquidate the Jersey Company, and it is now clear to us that gains and profits were accumulated for that purpose," then it seems to me that the gravest consideration must be given anew to the case as a whole.

Now, it is not my purpose to stand here and discuss the law of these cases. It is so much more familiar to Your Honors than it is to me, that it would be just silly and stupid to talk about it. To some extent Your Honors have made or at least developed the law. The law is very simple. If I am the only stockholder in a corporation and I allow its gains and profits to accumulate to avoid the imposition of the surtax, this tax is owed, and on the other hand, if I am the only stockholder of a corporation and I allow its gains and profits to accumulate for some other purpose, this tax is not owed. That, of course, is just how simple it is.

The Act, as we know, is implemented with two presumptions, the presumption that arises from the mere

holding company or the presumption that arises from permitting its gains and profits to accumulate beyond its reasonable needs, but as the courts have said, and as Your Honors have said, those presumptions are implements to the enforcement of the statute and whenever a taxpayer reaches the court room those presumptions are designed to make the taxpayer show his hand, as we all know has been said, and I have liked the fact that always in these cases when the taxpayer has come in and shown his hand and particularly when there is a long and extended record, I have liked the fact that the Board has always said: "We wish to go to the deeper question; we wish to know what the real purpose was."

I will, however, mention to Your Honors the Trico Securities Case, which was very recently decided, February 23, which to some extent reviewed prior cases of the Board. That was a case not dissimilar to this case, as no case can be very dissimilar, and in that case one of the presumptions, the presumption that arises from a mere holding company, was found to exist in one of the years in question. In that case there was a large surplus. In that case, large surtaxes were in fact avoided. In that case there were loans by the corporation to its stockholders, but this Board found that the real purpose that dominated the conduct of that concern was the purpose of maintaining a market in Trico stock, and when the Board looked through the whole thing and saw that purpose clearly there, all of these other things that I have mentioned were all brushed away—a big surplus, loans to stockholders, year-end tax sales by stockholders of the corporation, everything was of course brushed away when the Board could see there gleaming and pure and white the intention, not to prevent the surtax, but the intention to maintain a market in Trico stock.

Now, in the case that we are considering here, in a trial that lasted some two weeks, I on my part devoted all of my efforts to an honest and earnest attempt to show the purpose. There was, of course, almost an appalling mass of documents, schedules and tax returns and corporate charters, and Heaven knows what, put in evidence.

There was a stipulation, and my sympathy goes out to the Chairman of this Division as I think of him plowing through all of those papers, but on the whole I as the trial lawyer had scant interest in all of that bulk, because I knew that this Board would go to what you have called the deeper purpose, and I tried through the witnesses that I put on the stand and through cross examination of the Government's witnesses, to develop this one simple thing, and that was that for something over a quarter of a century it had been the purpose of this petitioner to liquidate the Jersey Company when its charter expired on July 10, 1940.

Member Opper: May I interrupt you, Mr. Welch, to ask you how much importance you attach to that specific date, July 10, 1940?

Mr. Welch: Well, as my argument develops, you will find that I attach less importance to that date than some of the Government witnesses, because the Government witnesses, at least one, believed the Jersey Company should be liquidated prior to 1940 if possible, and I shall call Your Honors' attention to his testimony. I attach significance to the date of the expiration of the Jersey charter because that was the date on which the charter did expire.

Member Opper: You would not say it was a fair statement of the claimed intention of the petitioner to liquidate the Jersey Company as soon as possible?

Mr. Welch: There was no testimony from the petitioner's witnesses that it should be liquidated prior to that date.

Member Opper: I am trying to find out your interpretation that you place on the testimony to see whether it really comes down to the question that you place great importance on the date of July 10, 1940, as being the date to which they were directing their attention?

Mr. Welch: I think it was of extreme importance, because when that date arose, there was what all of us in the court room repeatedly called "the 1940 crisis," something then to be done. The Jersey bonds were due, the corporate charter came to an end, you could not just gaily go by that date, something dramatic had to happen to the Jersey Company on July 10, 1940. There was no escape, that is why I say that the date was important. It was an absolute landmark when a half century of corporate existence came to an end, when the $14,000,000 of bonds became due, and when something of the most drastic nature had to be done.

Member Opper: Including the possibility, presumably, that the existence of the corporation might be extended?

Mr. Welch: That was a possibility which was canvassed in this court room but I am very happy to be able to say to Your Honor that no single witness either Government or petitioner, entertained for a moment the idea that it would be wise to extend the Jersey charter.

I shall call your attention in a moment to the testimony, and everybody was agreed that the part of wisdom lay in liquidating the Jersey Company, and I am sure that Your Honor will have some interest in those statements as I come along to them.

Now, because I can do it very swiftly, I would like at this point to call Your Honors' attention to just a few of the high spots in the testimony where this intention to liquidate the Jersey Company, and the intention to ac-

cumulate or the purpose of accumulating gains and profits to achieve that liquidation is made clear.

What I shall read is in each instance a very short statement, and they will, I trust, be of some interest to you. I think that the most natural man to turn to first would be Mr. Prince. He stated on page 424 of the record what his position was. At the bottom of 423 I put to Mr. Prince this question:

"Q. Mr. Prince, I have just got one other question to ask you: Will you tell us what your purpose was in accumulating funds in the Maine Company, as you have done?

And he answered:

"A. Why, sir, I recognized, as a man that had many years experience in finance, the obligations that I had before me to pay in 1939 and 1940. I kept that continually before me.

"I recognized the responsibility that I had, that in carrying on that industry and the association I had with the men who had been with me all my life, to see that nothing happened to it. I used the best judgment I could to be conservative. Through all the troubles that we have had and the uncertainty, I tried to hold my ship to its course.

"Whether I have done so or not—"

And the old man—he is very old, eighty, sort of hesitated and I thought he was going to break down at that point, and I cut off his examination, and turned him over to my brother for cross examination.

Now, on page 425, on cross examination, my brother said to him:

"You have spoken about your concern as to the 1940 liability. What do you mean by that?

"A. Well, there would be practically $28,000,000 would have to be raised, in 1940.

"Q. For what reason?

"A. Why, to pay off the $14,000,000 bonds that were due; to pay six million and a half of preferred stock; to pay three millions of bonds on the Central Manufacturing and to pay our guarantee on the Elevated bonds, I think it was $2,600,000, if I remember rightly."

Member Smith: Are you contending that at the date of the organization of the Maine Corporation, Mr. Prince and the others associated with him had the purpose that you refer to?

Mr. Welch: I claim, if Your Honor please, that the purpose was formed either at that time, or almost immediately after, Mr. Prince testified that when Mr. Armour was a stockholder in the Maine Company, he and Mr. Armour decided that when 1940 came around they would liquidate.

Member Smith: But you are not making any contention that the Maine Corporation was organized simply for the purpose of facilitating or bringing about the liquidation of the Jersey Company, are you?

Mr. Welch: I will say that the Maine Company was organized with a view to some day owning this enterprise, and that the ink was not dry on its corporate charter until its managers went out to acquire Jersey common, and strengthen their position slowly and steadily through the years so that when 1940 came this useless Jersey Company could be gotten out of this picture, and the enterprise headed, as it has in fact actually for years been headed by the Maine Company.

Member Smith: Do I understand you to mean by that, that it was the thought of Mr. Prince and Mr. Armour at the time of the organization of the Maine Company, that

this would be a means by which they could get control of the Jersey Company, and own it in its entirety?

Mr. Welch: I would go further. It was a means by which they intended ultimately that the Maine Company should actually be the owner of the stockyards enterprise as a whole. There is no doubt about that.

Member Smith: That is what I gather from the testimony of Mr. Prince on page 413 of the record. The question was asked him:

"Q. Now, Mr. Prince, after the Maine Company was formed, did you make some plan about what you wanted to do with the Jersey Company in 1940?

"A. Yes. Mr. Armour and I talked the matter over, and we realized that in 1940, that it would be advisable to liquidate the Jersey Company for two reasons.

"In the first place, when the New Jersey Company was formed, there was no means of raising any new capital. It was a difficult—you couldn't increase your stock, and so it was a difficult thing for the necessities of the yard to raise any new capital.

"In the second place, there was a very large saving to be made in liquidating the New Jersey Company. And then I called Mr. Armour's attention to that, and he joined me, and I brought up all the stock of the New Jersey Company that I could, every single share."

Mr. Welch: You are correct, and then one other little excerpt from the cross examination, on page 427, my brother said, speaking of 1940.

"Q. You would have expected to reorganize, wouldn't you?

"A. I wouldn't have reorganized, you understand:

I expected to liquidate the company. That is what Mr. Armour and I decided on."

Now, I won't dwell on Mr. Prince's testimony because if I were sitting where you gentlemen are, and I heard only the principal officer of a taxpayer testify, I think that I should say, unless I was enormously impressed by his demeanor, I think that I should say, I would like to see some corroboration of that before I am convinced.

Your Honors have often said that the testimony is impressive and to be considered if it is corroborated but just standing alone I think as I say in all honesty if I sat where you men sit I would want to hear more than that, so that I don't say too much, as I stand here, about Mr. Prince's testimony.

Member Smith: Right at this point, may I ask, if it be the intention of the Maine Company to liquidate the Jersey Company, why was there any necessity for the Maine Company to acquire the shares of stock of the Jersey Corporation?

Mr. Welch: Well, there were two possibilities for the Maine Company, they seem to be quite clear. In the first place under this 9 per cent guarantee with the earnings of the Jersey Company in excess of 9 per cent going to the Maine Company, with which Your Honors are all familiar, with that contract in force, the Maine Company might have sat there until 1940 and let the income flow in, and been very grateful for it, and do what you might call the hit and run, gather in no more stock, buy no common and buy no preferred, just take those earnings and as I said, be grateful for them, and let 1940 come around.

Now, had it done that, when 1940 came around, every unit of this enterprise below the level of the Maine Company would have been substantially busted as is the fact

today, the Jersey Company would have been without funds because all of its earnings except what the 9 per cent that went to the stockholders were swept up and properly so to the Maine Company, the Transit company and the Railway company, their earnings were swept up to the Maine Company, and so when 1940 arrived, if the Maine Company had played what I call the hit and run game, it could have enjoyed a delightful income but when 1940 came no company below the level of the Maine Company could have done anything about paying the debts or reorganizing or anything of that sort, and the Maine Company would just have disappeared. It was not a stockholder to any large extent, it simply had this contract which gave it the earnings above 9 per cent and the Maine Company would just have had no position, it would have had to just say goodbye to what has been a happy and pleasant existence.

The other alternative, and it seems to me the one that would appeal to any businessman, was to see quickly that when 1940 came, if the earnings were to be swept up to the Maine Company, as they had to be, then the Maine Company must do two things, if it didn't want to play hit and run. It must accumulate stock of the Jersey Company so that it could determine its destiny when 1940 came. It must have some position there other than this mere contractual one, to get a share of its earnings. It must become a stockholder, and the more stock it owned the better.

Member Opper: What about the third alternative?

Mr. Welch: Could I finish and then could I answer?

Not only must it become a stockholder but it must take good care that it has in its treasury sufficient funds so that it can take care of the Jersey bonds and all of the indebtedness, and not run the risk of having this thing taken away from it when 1940 arose.

Now, if Your Honor please, could I have your question?

Member Opper: I said, what about the third alternative?

Mr. Welch: What is that?

Member Opper: Suppose that your broom swept a little bit harder and while it was sweeping these dividends from one stockholder to another, it had continued to sweep and swept the dividend from the Maine Company to its stockholders?

Mr. Welch: Certainly if the Maine Company had been playing a hit and run game that is exactly what it would have done.

Member Opper: And suppose then that Mr. Prince had this money which the Maine Company now has, would he be any worse off from the standpoint of buying up this stock in his own name than the Maine Company would be, or than he would be as the purported agent for the Maine Company?

Mr. Welch: Your Honor is thinking of what Mr. Justice Brandeis has said?

Member Opper: I admit I didn't think of the idea.

Mr. Welch: Now let me answer that for you, if I may. Mr. Prince has got to make this decision:

At or about 1911, 29 years away from 1940, if he thought what Your Honor is thinking, he must have said to himself: I will be 80 years old, if I am lucky, but I know enough to know that I am very apt to be in Heaven or some other place. There is no sense in my saying that I will sweep it all up and put the bills in a safe deposit box somewhere to meet this 1940 crisis, because I will be dead by then in all probability and somebody will have to deal with my executors or my trustees, and he might even have thought, as I would have told him to think had he come to me for advice, I might have said to him, Mr. Prince, for all I

know you may be in an insane asylum in 1940. I regret to say I have had some clients who have had to go to an insane asylum, and when 1940 comes around, if you are in the bughouse somewhere it won't do you any good to have a safe deposit box full of bills, and had he asked me what to do I would have said, Well, now, Mr. Prince, I think the simple and the safe thing is to leave the funds in the Maine Company where you know where they are, and I would advise you as your lawyer to take down some gorgeous dividend like $400,000 a year. Mr. Prince, if you could tell me how in Heaven's name you need any more to have a wonderful life, I might listen to you, but I suggest you take down $400,000, and if that won't let you and your wife live gorgeously, well take down a little more, I won't care, but don't you run the risk that you will be dead when 1940 comes and don't you run the risk that you will be in some bughouse. Whatever you don't need to have a lovely scale of living, leave right in the Maine Company, and then I will know where you stand.

Member Opper: Suppose the Maine Company had all of its money in cash and Mr. Prince was in the bughouse, who would the Maine Company be?

Mr. Welch: The Maine Company would be the Maine Company, you can't change it. The beauty of the Maine Company is that it exists forever. It is free of the risk of death, and free of the risk of insanity.

Member Opper: Are you suggesting in trying to prove the purpose of this petitioner, you are really doing anything but proving Mr. Prince's purpose?

Mr. Welch: Well, how can a corporation, if Your Honor please, have any purpose?

Member Opper: That is what I am asking you, so if Mr. Prince was in the bughouse, whose purpose would the Maine Company's purpose be?

Mr. Welch: Now, it seems to me that we are confusing two different things. I am talking about the purpose in accumulating the funds in the Maine Company, and I am saying to Mr. Prince back in 1911 that had better be your purpose, when 1940 gets here you may be crazy or dead and can't have any purpose or can't act, but your purpose all through these years had better be to put that money where it can be found when this long distant thing comes around. I don't know what will happen to your personal fortune, I can imagine creditors attacking you, and you have some immense court claim against you, and Mr. Prince had he seen me in 1911 would have told me that he operated a yacht and I could imagine his yacht sinking a liner, for example and having a most colossal court liability arise on Mr. Prince as an individual.

Member Opper: But you are suggesting that Mr. Prince's interest in this impersonal entity, the Maine Company, was so great that if the creditor had come along and attached his personal fortune and presumably his holdings in the Maine Company, that Mr. Prince would still have been interested in this impersonal enterprise continuing even though he and his family had lost all of their holdings in it.

Mr. Welch: Certainly the attaching creditor that you speak of, suppose that Mr. Prince's yacht had sunk the liner and the immense liability had arisen and the attaching creditor would have got his stock in the Maine Company, that is what he would have got and I think that his counsel would have said to him, as I would have said to that attaching creditor, "I certainly congratulate you, and now that you have got that stock, if you have got any sense you will do just what Mr. Prince has been doing, you will be saving up your income so that when the 1940 crisis arrives you can do something about it.

Now I want to turn to just two or three other places in the record where this intention of Mr. Prince was testified to. I am now turning to page 320 where Mr. McDonough testified, and now my question to Mr. McDonough was—I am taking this up quickly:

"*Q.* Will you tell us the substance of what was said by him at that time?

"*A.* In my own words, or—

"*Q.* Oh, yes.

"*A.* 'Mr. McDonough' he said (this is quoting Mr. Prince) 'Mr. McDonough, I am delighted that you arrived at this form of report, and I hope that you will keep it constantly before you and keep it up to date, as nearly as you can, because I want to accumulate all of the cash that I can between now and 1940 to meet a very large obligation that is ahead of me, and I want to know what my cash position is from day to day, if possible, and I want you to keep me so advised.' "

Mr. Leonard, at page 109, had something to say about Mr. Prince's intention, and I won't even pick up the question because his answer is so clear. I am reading only his answer on that page, on page 109, it is near the top, if your Honor please. Mr. Leonard said:

"Well, I was urging upon Mr. Prince the serious necessity—"

I think that I must interrupt—perhaps the two Members other than the Chairman ought to be told that Mr. Leonard ran the Transit Company in Chicago which operates the stockyards.

Member Smith: He was president of it?

Mr. Welch: Yes, and the operating man out there, and now I will read again. This is Mr. Leonard:

"*A.* Well, I was urging upon Mr. Prince the serious necessity of building fire-proof hog houses, and fire-proof sheep house, and Mr. Prince said: 'Well, Mr. Leonard, why, I cannot possibly let you have any such sum of money as that now. I have got a very, very large sum of money to raise to pay off the indebtedness of 1940. I know that you would like to have the hog houses; I am perfectly willing to have you have them, but until after 1940, nothing doing.'"

And on the next page he is talking in the middle of page 110, Mr. Leonard is talking about another conversation, in which while I won't read it in the earlier questions and answers he is complaining to Mr. Prince that he is niggardly about the Transit Company, that he skins it out of money too much, and Mr. Prince said to Mr. Leonard:

"I know that you feel that I am skinning all the money from you, and not giving you what you would like to have, but until this indebtedness is paid—in short, that was the burden of his song—he must pay this indebtedness in 1940."

Member Smith: Mr. Welch, it is true, is it not, that if Mr. Prince or the Maine Company had used the funds it had accumulated up to 1929 to acquire bonds or save up to pay them off, he would have had his $14,000,000 all paid off by 1929, wouldn't he?

Mr. Welch: Yes, it was developed at the trial, and some of the Government experts took the view that Mr. Prince should have bought Jersey Company bonds all the way along, and I rather sympathize with that view. I think that that would have been a perfectly reasonable thing to do, but Mr. Prince's position was that he thought the critical thing was the Jersey common, and I have great sympathy with that. As to the preferred, which by the way,

is a voting stock, votes equally with the common, being a very wise old man he always bore in mind that the preferred stock could be retired at 105 when 1940 came around, or at par, so that I somewhat think that it would have been the part of wisdom to have accumulated Jersey Company bonds but Mr. Prince testified that it was his impression that they were not particularly available on the market, and one reason I think it would have been a good idea was that if they had used the cash in the Maine Company that attracted the attention of the Revenue Agent and the Commissioner to buy Jersey bonds I think perhaps this case would never have arisen, certainly I know this, and how simple it was, if Mr. Prince had allowed the earnings to remain in the Jersey Company, which was in his full power, mind you, the excess earnings over nine per cent, if he had not sucked them up under his contract, and allowed the Jersey Company to acquire $14,000,000 to pay its indebtedness in 1940 it would not have attracted the slightest attention or criticism, and that is one thing that I find very moving to me. I can't imagine a man having this intent, this nefarious intent, as we call it, I can't imagine him sucking all of that money up into the Maine Company where it sticks out like a sore thumb, when the simple thing to do, if he had anything like that in mind, was just to let the money pile up in the Jersey Company and he could have tucked away $14,000,000 in the Jersey Company to have paid its bonds in 1940 and nobody could have been in any sense critical of it.

Member Opper: It is a fact, isn't it, that some of this money, I suppose what might be characterized as a considerable amount, was used for the purchase of Jersey common?

Mr. Welch: Oh, yes, indeed.

Member Opper: Now, the position with respect to the

Maine Company, and Mr. Prince and the Jersey common, was, as I understood you earlier, something quite different from what would have happened if the company had been buying up its own bond obligations, that is, since the Maine Company was not a heavy stockholder of Jersey, neither the Maine Company nor Mr. Prince could have controlled the Jersey Company, is that right?

Mr. Welch: That is right.

Member Opper: Now, is that a reason why Mr. Prince chose to use money to buy up Jersey Common?

Mr. Welch: I think it is. He so testified.

Member Opper: And what was the history of the purchase of that Jersey common? Can you refresh your mind on that very briefly? I mean beginning in 1911, and going through to say 1930, the purchase was larger in the earlier years, wasn't it?

Mr. Welch: Yes.

Member Smith: Right at this point, may I state that Exhibit S-59 shows that the Maine Company made its first purchase of Jersey Company common stock in 1913, and it purchased 100 shares at $65,000 or at $650 a share and it is stated in a footnote on the exhibit that that did not represent the fair market price.

The next time that the Maine Company purchased any of the Jersey Company stock was in 1918 when it acquired 17,929 shares from F. H. Prince & Company.

Mr. Welch: Oh, indeed, but Your Honor in that is forgetting that the F. H. Prince & Company acquired that huge block of shares, as the agent, so to speak, of the Maine Company, and the idea was to accumulate the stock and pass it on to the Maine Company, as was done, and indeed Mr. Prince thought it so essential for the purposes of the Maine

Company, that he lent the Maine Company some $3,000,000 to enable those purchases to be made.

Member Opper: That was five years after this presumable plan or six years after this plan or seven years after this plan, presumably was created, is that right?

Mr. Welch: Yes, but you see

Member Opper: What had been happening in the meantime, when stock was to be acquired for this ultimate purpose that you are talking about, including as I understand it, the very significant important matter of control of the Jersey Company by Prince in the Maine Company?

What had been happening in fact about the acquisition of this stock, that is to say, who had been acquiring it? Was it the Maine Company, or was it Prince?

Mr. Welch: The answer to that is so simple, and so beautiful, it was acquired by F. H. Prince & Company, but the reason it was acquired by that company was that the Maine Company just did not have the funds to do it with.

Member Opper: So that if this awful thing that Mr. Prince was afraid of had happened, any time during those seven years, if he had died, or if his yacht had run into something, this stock would have been a part of his estate, is that right, during those seven years, and it was not until after the passage of the income tax law, and the surtax, that this thing happened, is that right?

Mr. Welch: Just a moment.

Mr. Green reminds me that the Maine Company acquired really huge blocks of Jersey Company stock from the very outset, exchanging its own bonds for the Jersey common, so that the acquisition of Jersey stock by the Maine Company began on its formation and continued from that day to this.

The only way that the Maine Company could itself acquire the stock in the early years was by issuing its bonds and it acquired some 30,000 shares within a year or two after its formation.

Member Opper: It is a fact, isn't it, that in 1918 Prince had $3,000,000 odd worth of this stock?

Mr. Welch: That is true.

Member Smith: That stock was owned outright by Mr. Prince up to the time that he turned it over to the Maine Corporation?

Mr. Welch: It was owned in the sense that he had possession of it, that is true.

Member Smith: He was under no legal obligation to turn it over to the Maine Company?

Mr. Welch: I am inclined to think that he was: I am not entirely sure that the record may be clear on that point.

Member Smith: There is nothing in the record that I could find to show that he was under any legal obligation whatever to turn that stock over to the Maine Corporation.

Mr. Welch: Certainly the place where it belonged in the last analysis was in the Maine Company, but because the Maine Company had this 30,000 shares of Jersey common which it had issued for bonds, and any man of any sense would have seen what we might call the Prince block in the early years to be added to that to strengthen the position of the Maine Company and let that control the destiny of the Jersey Company when 1940 arose.

Member Opper: You are not suggesting, are you, Mr. Welch, that if Prince had owned a certain number of shares, and the Maine Company had owned a certain number of shares, that any question would have been raised as to the control to be exercised by that joint block, because

part of it was owned by Prince and part was owned by the Maine Company.

Mr. Welch: Oh, I am in perfect agreement with Your Honor. There is no slightest doubt that Mr. Prince intended that the two blocks should be amalgamated and they were amalgamated. Anyone in his senses would have intended that.

Member Opper: No, what I mean to say was that if there had never been any transfer of book title to these securities from Prince to the Maine Company, any question of control would have been affected by that.

Mr. Welch: Not except as I think Your Honor will agree it is much better to have them in the Maine Company, and when Your Honor points out the risks involved in the earlier years, I agree that the risks were there but to a much less extent, because Mr. Prince was a very much younger man, and a very active man in those years.

Member Opper: Isn't it a fact that what we have got to do, assuming that there was that third alternative, if Prince himself could have allowed the dividend to be paid and that he could have acquired the stock, that then we have got to go back and find out which one of those purposes he actually had in those earlier years, to find out whether it made any difference to him, or whether he did not intend in fact a large amount of this stock to be bought in his own name for his own purposes until it came to the time it was evident that he could save income taxes by having this stock purchased by the Maine Company, and the failure to declare dividends—

Mr. Welch: When Your Honor says we have got to go back and explore this third alternative, I think that you have just got one place to go back to, and that is to the record, and there wasn't any witness that took this stand in

the court room, Government or otherwise, who had anything to say in favor of that alternative.

Member Opper: I am not talking about this question of whether it was a reasonable business purpose or whether there was anything theoretical about it. I am talking about just a question, supposedly a question of fact, that is, what was the state of Prince's mind, what is there in the record on that, as to which of these possible alternatives he might have had in mind assuming that if he accepted the fact that he wanted to acquire the control of Jersey Company—

Mr. Welch: I think the simple answer is, if Your Honor please, that the record is just a blank on it. Nobody said that that was a reasonable alternative. Everybody testified that the reasonable alternative—

Member Opper: You don't deny that there, that that was a reasonable alternative, do you?

Mr. Welch: I certainly do. I have told Your Honor—

Member Opper: Even though Prince himself adopted that plan to some extent by buying the stock in his own name?

Mr. Welch: But he turned it over to the Maine Company as soon as he could.

Member Opper: In 1918.

Mr. Welch: I would substitute for 1918, the words "as soon as the Maine Company was in a financial position to take it."

Member Opper: Oh, now, do you suggest that in 1918, the Maine Company was in a position to pay cash for this?

Mr. Welch: No. As a matter of fact, I now remember that he took the Maine Company's I. O. U. for it.

Member Opper: Which he could have done from the beginning.

Mr. Welch: I suppose that he could. I suppose that practically speaking he had the Maine Company's I. O. U. for

it because if he was buying it for the Maine Company, as I think the record shows that he was, practically speaking, I think that he had their I. O. U., whether it was formal or not.

Member Smith: When you say that it was better for the Maine Corporation to own this stock, how did you mean that it was financially better for the Maine Corporation to own it inasmuch as the Maine Corporation would not have to pay any income tax with respect to the dividends received on the stock, whereas F. H. Prince would?

Mr. Welch: Not at all. I merely meant that when you get it into the Maine Company, which has an enduring life and no risks attached to individuals, you have got it right where it belongs, and now I would like to say to Your Honors, that there seems to me implicit in the questions that have been asked me, it assumes that there was some advantage to Mr. Prince from a tax purpose in turning over the shares to the Maine Company, in 1918.

I wonder—there was something in Your Honor's opinion that seemed to me to indicate that you had in mind—

Member Smith: I don't see how it can be denied.

Mr. Welch: How simple it is, Mr. Green I think somewhere has the figures on that. I can show them. Would Your Honor delay just a moment?

I would like to have Mr. Green answer that. He has worked the figures out and I have not.

Mr. Green: I worked the figures out and gave them to Mr. Welch, and I think it is a very easy matter to develop. According to the petitioner's exhibit attached to the stipulation, S-59, Mr. Prince turned over—

Mr. Clark: May I ask indulgence for just a minute until we find that?

Member Smith: We will take a five minute recess.

(Whereupon there was a recess.)

Mr. Green: I think what we are discussing has a bearing on a paragraph in your opinion, I am reading from page 33 of the printed pamphlet form of opinion, I haven't it in any other form, at the bottom of page 33 of the opinion it was stated:

> "The evidence shows that the petitioner was availed of by Prince for the purpose of reducing his own tax liabilities. Over a number of years Prince had accumulated more than 17,000 shares of Jersey Co. common stock upon which he was receiving an annual dividend of $9 per share. These were his own shares of stock. The dividends on them were taxable to him. In 1918 he transferred all of those shares of stock to the petitioner at cost and was thereafter relieved from the payment of surtax upon the dividends thereon."

Now, that statement, that last statement, in the last sentence is correct as far as it goes, but with all due respect to Your Honors, I don't believe it goes far enough and has all of the facts in it.

If you will refer to Exhibit S-59 attached to the stipulation, you will find the exact number of Jersey common shares which Mr. Prince turned over to the Maine Company in 1918, which was 17,929, and the exact price for the shares, which was $3,190,339.96.

Now, when Mr. Prince turned those shares over to the Maine Company, he received from the Maine Company as Mr. Welch expressed it, an I. O. U., from the Maine Company. He received from the Maine Company an I. O. U. for $3,190,339.96, and as Your Honors found in your opinion on page 16—I beg your pardon, on page 12:

> "Upon the petitioner's debts to Prince it paid interest at the rate of 5 percent or more."

So when Mr. Prince turned over these shares he received an I. O. U. upon which he received interest at the rate of 5 per cent or more.

Now let us assume that he received the lowest rate mentioned, namely 5 per cent. He gave up and was relieved from the duty of paying income tax, that is surtax alone because dividends were not then subject to the normal tax, of $9 a share on 17,929 shares. That is, he gave up dividend income amounting to $161,361.

At the same time in exchange for that he received interest income of at least 5 per cent on $3,190,339.96 or $159,516.99. The effect of that transfer was a net decrease of income of $1,834.01, but the dividend income was subject only to the surtax, whereas the interest income was not only subject to the surtax but was also subject to a normal tax which at that time was at the rate of 12 per cent, so that he paid substantially $20,000 more in taxes as a result of transferring that stock to the Maine Company, and receiving the Maine Company's I. O. U. in place of it. That is $20,000 a year more in income taxes.

Member Smith: That situation would obtain only so long as the indebtedness remained.

Mr. Green: But the minute the Maine Company indebtedness was outstanding, it is only fair to assume that the money which was received from the Maine Company was put to good use by Mr. Prince for extinguished obligations on which he was paying something so that I don't think it can be fairly said that that was done by Mr. Prince to save taxes, or in effect did save taxes, in fact it increased them.

Mr. Welch: I don't think I need to remark, if Your Honor please, that the questions from the bench, which I very much welcome, tend to extend my guess as to how long I might take.

Now, I was about to read another excerpt from the evidence, just a few lines, where Mr. Prince again talked about what his intent was. This is in the testimony of Mr. Reimers, a witness for the petitioner, on page 288 and I am breaking right in because I know Your Honors can follow me. He is talking on page 288 of a conversation that he had with Mr. Prince at the time when Mr. Reimers was telling Mr. Prince that he ought to save the Chicago banks and that if it took $10,000,000 to do it, he could not afford to let the banks go down, and Mr. Prince was resisting him, saying that he didn't want so much money to go out of the enterprise, and particularly out of the Maine Company, if he could possibly avoid it, and Mr. Reimers was saying, You have got no choice, you can't let the banks go down, and in the course of that conversation, I am now reading from the record, "He asked me," that means Mr. Prince asked the witness,

> "He asked me if I was familiar in any way with the different companies. I told him I was not, and I was not at that time. He explained to me the names of the different companies, what his plans were, and what he was striving to do. And I recall particularly that he drew attention to his plan to accumulate cash sufficient to retire debts of the companies in 1940, and that in whatever plan I might work, to please try and avoid calling upon that fund, if I could. And that same conversation was repeated in New York."

Now, just one more place in the record, and I am only selecting places that can be read very shortly, there are a few lines in Mr. Walker's statement, or testimony, appearing on page 631, they are very obscure and I can understand their being missed by the Board because Mr. Walker was called as an expert by the petitioner to put his stamp of approval as an expert upon the conduct of this business.

but it so happened that he was personally acquainted with Mr. Prince, and Mr. Prince had talked to him about his plans and so he is asked to tell that conversation.

"*Q.* Will you tell His Honor what, if anything, Mr. Prince has said to you about what his plans were?

"*A.* Well, there is no question that his plan was to liquidate the Jersey Company. He has told me many times that his theory was to get rid of the intermediate company, that he wanted to hold onto cash, particularly in the last seven or eight years, because he was very fearful—frankly, I felt he was too blue on that point—but he said, 'No, I am going to hold onto cash, and I am going to keep cash as near as I can in one pocket, because then I am going to know where that cash is.' He was always worried about the possibility of bank trouble, and he was just going to keep his cash in as strong a bank as he knew how to keep it and be conservative, indeed, in the extreme."

Now, I have touched on this testimony, on the intent, because everyone in this room agrees that that is the heart of the case. The purpose for which the funds were accumulated is just the whole case, and I have touched on it because the majority, as I understand it, did not believe this testimony:

I take that, I don't get it so clearly from the majority opinion as I do from the minority, but it appears in the minority opinion in this way:

"These witnesses were entitled to belief and their testimony is credible and in no respect impugned or otherwise weakened either by cross-examination or countervailing testimony." And then again on page 37:

"There is no reason why the Board should be incredulous of the several statements of that continuous purpose. It would be reasonable to infer such a purpose even if there were no direct testimony that it existed. Furthermore, opinion witnesses for both the petitioner and the Government all testified that such a purpose would be reasonable. The only witnesses for the Government were three analysts who, after a study of the history and the probable future, agreed that the liquidation of the Jersey Co. in 1940 was a desirable objective and that it would not be unreasonable to build up a fund to provide for it."

Now, turning to the majority opinion, the disbelief of the witnesses on intent is less clearly stated but I think it is there. On page 35, for example, the majority opinion says:

"Although Prince testified that under his program it was contemplated that the Jersey Co. would be liquidated in 1940; there appears to be no necessity for its liquidation and many reasons why it probably will not be liquidated."

And again at the bottom of that page:

"Although it may be desirable to merge or consolidate the petitioner and the Jersey Co., it seems doubtful whether the Jersey Co. will be liquidated in 1940."

Now, I take it from what the minority said, as well as the majority, that this Board did just disbelieve the testimony that I have read to Your Honors, and that in spite of the fact that it was not assailed on cross-examination or any countervailing testimony put in, and I gather from the majority opinion that one reason that the Board disbelieved the testimony was because they felt that the plan

to liquidate the Jersey Company in 1940 just was not a reasonable plan. It did not seem to the majority to make any sense, for businessmen to have such a plan, and so I think that there is in the majority opinion a sort of combination of disbelief of witnesses, and the thought that the plan is unreasonable anyway.

Now, on the unreasonableness of the plan, and I shall argue shortly that it was far from unreasonable and that every witness agreed that it was reasonable, on the unreasonableness of the plan it does not seem to me that it makes any difference, as long as the plan was actually held. I would like Your Honors to bear with me for just a moment while I put what I consider somewhat a fantastic case to you for consideration.

I would like to have you assume that in these years in question some man, let us call him a crank, went to Mr Prince and said, "Mr. Prince, I see heavy war clouds in Europe, and I have got the most marvelous scheme to prevent war. I have invented a new and devastating weapon that will just stop war, and I have looked over this country and I find that you have a very rich corporation, with a large surplus, and that you are entitled to go into the manufacturing business, and I want to give you my scheme, and I want you to stop declaring dividends, and I want you to pile up your surplus, and get in a position so that this new device of mine that will stop war can be turned out in gigantic quantities at a moment's notice. And then when the war clouds really appear, I am going to go to the aggressor and I am going to say, 'Look what I have got. If you don't stop this war your whole population will be annihilated,' and now, Mr. Prince, I think that I can stop war. Will you stop declaring dividends and build this company up so that I can make this gigantic threat to these aggressors?"

And suppose Mr. Prince fell for this somewhat fantastic thing—incidentally I don't think it is much more fantastic than Henry Ford's Peace Ship was in the last war, but let us assume that Mr. Prince fell, and let us assume that somebody came along and tacked on this tax, and that the case were tried and that in some way it were possible for you to look straight into Mr. Prince's heart and see there clear and white and gleaming this purpose to prevent war.

That is all that there would be to the case, the fact that the purpose would seem to you somewhat unreasonable would make you look with a more critical eye into his heart, I admit, but if you can assume that you can look straight in and see the purpose in there, gleaming and pure and white, the case is over.

Now, will you bear with me while I put another example?

Let us assume that I have a corporation, of which I am the sole stockholder, and that year after year I declare out 100 per cent of its dividends and it has not surplus and no accumulation and year after year the examiner comes around and looks me over and says, "O.K., it looks good to me," and then he comes around in the last year, and I have only declared out 90 per cent, and after he has looked the thing over he says to me, "Well, Mr. Welch, I notice that you made a little change this year, you did not declare out all of your earnings, but you declared practically all."

I say, "That is right."

He says, "Well, that looks all right to me."

And I say, "Well you might be somewhat interested to know why I didn't declare them all out this year. It just happened that when the dividend date came around I was making up my income tax return, and I just happened to notice that if I declared them all out this year, I hit a new bracket in my surtax, and I decided I was paying all the

surtax that I meant to and so I cut that dividend to 90 per cent to save my hitting that last bracket."

And let us assume that the Revenue Agent said: "That is very interesting to me. Would you mind giving me a little affidavit to that effect?" And I said, "Why sure. It is the truth." And I gave him the affidavit.

When he took that affidavit to the Commissioner, it would be the Commissioner's duty to stick me with this 50 per cent tax, and if I came into this court room with all of the lawyers in Christendom and sought to save that tax I could not do so.

In other words, if you have the intention to avoid the imposition of surtax, no matter how silly it is for you to have it or how costly, you run into this gigantic penalty tax, and on the other hand, if you don't have that intention, if when the Board looks into the hearts of these men and sees that that purpose is not there, then the tax is not due.

I would like to put it in that way because it is so fundamental to this case.

Now, what puzzles me, if Your Honor please, is how 12 members of this Board could have found that the purpose to save money, to liquidate the Jersey Company, was unreasonable? Naturally, my witnesses testified that it was a reasonable and laudable purpose, but the curious thing was that when the Government experts took the stand they seized the flag that I had carried, as I put it, on my case, and carried it around themselves, and again I want to make very short references to the record.

I want first to turn to page 1039. That is Dr. Atkins on the stand. He was one of the Government witnesses, and there is the short exchange between me and him, in cross examination, and here is my question:

> "Q. Any director of the Maine Company who planned on liquidating the Jersey Company in 1940 would seem to you a wise director?

"A. On the basis of the facts as I know them now, yes."

Well, let us look at Dr. Friday, you will find him on page 1082, and the curious thing about Dr. Friday is that he is not even on cross examination, he is on direct examination, and I will read from the middle of the page, 1082, when Dr. Friday is giving his opinion on direct and I am beginning in the middle of a long answer:

Dr. Friday said:

"The question that I asked myself at that point was whether at the end of 1929, which is the year just before 1930, the first year with which we are here concerned, there was an accumulation of liquid assets which met the reasonable needs of this business, the reasonable needs, as I gathered, being determined very largely by the fact that in 1940 a large number of these bonds became due, and the evident feeling that has been manifested here that at that time the New Jersey Company should be liquidated.

"I have not found much difference of opinion among any of the witnesses. I have read their testimony on this point, and I am in agreement that it should be liquidated in 1940."

There was only one other witness, an expert, and again he is for the Government, and that is Mr. Merriman, on page 894, and once more, he is not under cross-examination, it is a colloquy with the member who heard the case, and this is short, but is it pointed!

"The Member: Well, now, then, as I understand what you intended to have me understand was that during the years 1930 to 1933 it would have been the part of wisdom for the corporation to have contem

plated the earliest elimination of the New Jersey Company when financial conditions permitted?

"The Witness: Yes, sir.

"The Member: Not to wait until 1940?

"The Witness: Yes, sir.

"The Member: And certainly not to project it beyond 1940?

"The Witness: Yes, sir."

And I think Mr. Sternhagen was almost incredulous and he said:

"The Member: Is that the situation?

"The Witness: That is."

Now, there are the three Government experts coming on the stand to tell us whether or not they thought a plan to liquidate the Jersey Company in 1940 was reasonable, and they all seized the flag and carried it around the court room, and said, "Sure, we are all for it."

Now, in the face of that testimony, I confess that I am disappointed to have the Board say, "We don't believe it will be necessary to liquidate it, and we don't think it will be liquidated, and we don't think it is a reasonable plan."

As I view it, the Board is entitled only to get its ideas from the evidence, and the evidence was simply unanimous. Everybody on both sides said that the Jersey Company should be liquidated.

Now, in a similar vein, on page 31 of the opinion, the majority said, about in the middle, on page 31:

"Clearly, there was no reasonable need for the petitioner to acquire the balance of the common stock and the outstanding preferred shares of the Jersey Co."

Now, that is quite a strong statement.

"Clearly, there was no reasonable need for the peti-

tioner to acquire the balance of the common stock and the outstanding preferred shares of the Jersey Co."

Now, once again, evidence was all the other way, and again I take up only the Government witnesses. They all differ with the Board, or with what the Board says there. I turn for example to Mr. Merriman first, at page 872, and he is now under cross examination by me, and I am having these witnesses, as I often did, assume that they were at a directors' meeting with me and discussing the wisdom of the plans about the Jersey Company.

Now, let us assume that; this is the question:

"Q. Now, let us assume, Mr. Merriman, that we are the board of directors of this company in 1930 and 1933, and we are looking forward to what we are going to do in 1940. You have already told me clearly that the Jersey Company ought to be liquidated.

"A. I think it could be advantageous. I do not think it is essential at all.

"Q. But you think that good business judgment would be to liquidate it, do you not?

"A. Yes, sir.

"Q. And the consequence is that you and I both agree that bonds have got to be paid off; that is 14 millions?

"A. Yes, sir.

"Q. And, say, four or five millions of guaranteed bonds have got to be dealt with in some way.

"A. Yes, sir.

"Q. And we know that this preferred stock has got to be paid, and that is about 6½ million dollars.

"A. Yes.

"Q. And we know that the rest of the common stock

that they have not yet succeeded in getting has got to be dealt with in some way.

"*A.* Yes, sir.

"*Q.* Now, in any man's language, that is a large program; is it not?

"*A.* It is a substantial refinancing program; yes, sir."

Now, for Dr. Atkins' views on accumulating more common and more preferred, I turn to page 990 and 991. On 990 I am breaking into a long answer of his, at the top of the page, I am breaking into an answer, and he says there:

"I find that maturing in 1945, but guaranteed by the New Jersey Company, $2,327,000 of Elevated Railroad bonds, which presumably would demand consideration at that time."

Member Smith: What page is that?

Mr. Welch: Page 990. I will start again:

"I find that maturing in 1945, but guaranteed by the New Jersey Company, $2,327,000 of Elevated Railroad bonds, which presumably would demand consideration at that time. And I also give consideration to some other securities, which might or might not demand consideration, depending on the action taken.

"The New Jersey Company preferred stock of 6½ million, and Maine bonds of approximately 5 outstanding in the hands of the public, amount to $3,200,000. And I also put in a figure in excess of $300,000 to represent the value at the approximate market price of the nine dollar guaranteed common stock of the New Jersey Company in the hands of the public, making a total of $26,850,000 in round figures.

"Now, one of two courses of action, it seems to me, will be possible: One is to continue the New Jersey

Company by procuring a renewal of its charter, which, while obviously not sure at this time, nevertheless seems to me to be a matter which reasonably—a consummation of which might be reasonably contemplated, if it should be desirable."

And then I am skipping to the top of page 991 and taking up just three lines:

"Another possibility would be the elimination of the New Jersey Company and the assumption of its assets and liabilities by the Maine Company."

And then skipping to 994 at the top of the page, the Member said to him: this is at the bottom of 993:

"The Member: Yes, but I am talking about the voluntary substitution of one indebtedness for another. You can only do that when the terms of your new indebtedness could be an improvement on the terms of the old."

And then this cogent statement:

"The Witness: That is true, sir, but here we have a definite date, 1940, when you have no choice in the matter. Your securities mature at that time. You will have to pay them off."

Well, then, I turn lastly to this statement of Dr. Friday, on 1078, and running over onto 1079, and he is on direct examination. He is not even on cross examination, and he is asked to state the reasons which led to his opinion, and he says:

"A. Well, I studied this whole situation with all these figures of income and assets accumulated, and cash accumulated. I have listened to the testimony and read most of it. And it is clear that in trying to ascertain what are the reasonable needs, the thing that seems to be at the very center of the problem is what are the

reasonable needs of the Maine Company, particularly in view of a situation that it has—of these situations that it has confronting it in 1940.

"It has been repeated here over and over that in 1940 the charter of the New Jersey Company expires, the bonds fall due. There are 14 millions of them. There are some $2,327,000 of Railroad bonds that the New Jersey Company guarantees the principal and the interest. They will have to be taken care of, and when the charter expires there are preferred stockholders entitled to receive $6,500,000 upon dissolution or sale or the customary phrase that is contained in the preferred stocks. That Mr. Prince is desirous of retaining control of this whole stock yards situation together with the Chicago Junction Railroad situation, and since because that is the chief source of his income, and of the income of the Maine Company, and since that is true, he naturally concerns himself certainly as an individual with the smooth handling of that management of that situation in 1940 in order that no untoward event may befall these companies or this industry.'"

Now, the Board said that it could not see any reason to acquire any preferred or any common but the Government witnesses saw the most cogent reasons for them, and as I pointed out to Your Honor, they saw it not in cross examination, when they were being led or fooled or anything else, but they stated it clearly as their own opinion.

Now, the majority opinion says on page 30, also this, and I now come to what I consider the most important part of my argument: The majority says about the middle of the page, at the end of the paragraph beginning on the page—one, two, three—the end of the third paragraph:

"Certainly there is no indication of the need for any further accumulation in the years 1930, 1932, and 1933."

In other words, as I put the minority opinion together with the majority, it was, I think, clearly the majority's opinion that such accumulations as were permissible had all taken place by 1929 and that the majority could see no need for any further accumulations.

Now, there is where I express disappointment amounting almost to despair, because once again the three Government experts had all taken that stand, in that corner of this room and testified with the utmost pointedness that they thought further accumulations in the years in question should have taken place, and I want to turn, if I may, to those. I think that I won't turn to them; it takes a bit of reading and I am sure that Your Honors will agree with me that if I say it is in the record it is in there.

In the record beginning on page 890, Mr. Merriman testified that in every year in question he would have accumulated some earnings, and the lowest that he would have accumulated in any year was 40 per cent, and the highest accumulated in any year was 50 per cent.

Dr. Atkins, he appears in 1015 to 1035, and Dr. Atkins testified that there was no year in which he would have accumulated less than 50 per cent.

And Dr. Friday, who testifies on this point in 1098 to 1104, testified that the lowest that he would have accumulated in any year was 30 per cent, and the highest that he would have accumulated in any one year, which was 1933, was 66 2/3 per cent.

And now I would like to turn to just one other part of the record, and see if Your Honors will—to see how cogent the testimony was; I am turning to page 890 to 894.

This is Mr. Merriman, the lead-off expert for the Govern-

ment, and I take him under cross examination when I am full of fire and enthusiasm and I look back with pleasure on that moment when I got him so readily to go exactly for the theory that Your Honors have failed to go for, that is to say, in your opinion Your Honors have said that there is no need for any more accumulations after 1929, and now let us listen, if you will, to Dr. Merriman:

This is my question:

"*Q.* Now, just one more thing, Mr. Merriman. When we talked about these years '30, '31, '32, and '33, you started saying 60 per cent might go out?

"*A.* Yes, sir.

"*Q.* And the next year, in '31, 50 to 60?

"*A.* Yes, sir; I think I said 50 to 60.

"*Q.* And the last two years 50?

"*A.* Yes.

"*Q.* It follows that you are in favor of some accumulations; aren't you?

"*A.* I have given you merely an offhand opinion as to what I would have done in those particular years.

"*Q.* And what you would have done would have been to have plunked for the theory of some substantial accumulations, wouldn't you?

"*A.* I am not certain about that. I have given you, as I have said, an offhand opinion.

"*Q.* When you plunk for the theory that you would declare out 60 per cent, you are plunking for the theory that you will accumulate 40, aren't you?

"*A.* Yes, sir.

"*Q.* And when you plunk for the theory that you will declare out 50, you are plunking for the theory that you will accumulate 50; aren't you?

"*A.* Yes, sir.

"*Q.* So the theory of accumulation in some figure for the 1940 crisis is subscribed to by you, isn't it?

"*A.* I don't consider that there is a 1940 crisis.

"*Q.* Strike out the word 'crisis'.

"So that the theory of some accumulation for the 1940 liquidation of the Jersey Company is subscribed to by you?

And may I say here for a minute he tries to escape me, but oh, does he come back to me. His answer to that—I will read the question.

"So that the theory of some accumulations for the 1940 liquidation of the Jersey Company is subscribed to by you?

"*A.* No, sir. The theory of some accumulation is based on the fact that it is always wise to retain some proportion of your earnings for unforeseeable difficulties or unforeseeable opportunities, either one, and that is the basic theory on which I would tend to reserve a surplus as a matter of insurance against the unforeseeable.

"*Q.* And the difficulty, Mr. Merriman, of liquidating the Jersey Company in 1940 was entirely unforeseeable in '30 to '33"—And he said "I would—

"*Q.* May I finish my question, sir?

"*A.* Certainly.

"*Q.* What difficulties might, in fact be met in liquidating the Jersey Company in 1940 and ridding this enterprise of its debt were, of course, entirely unforeseeable in the years 1930 to '33, weren't they?

"*A.* Yes, sir."—

And listen to this.

"*A.* Yes, sir; and in view of that fact I would have advocated the elimination of the Jersey Company at

or prior to 1933, whenever financial conditions were good."

And I started to say something, and I said: "I think that is—", and the Member said: "At or prior to what?" And the witness said:

"1933, whenever financial conditions were good."

And I burst in again, and I said:

"*Q.* Don't you also mean at or prior to 1940, too?

"*A.* Yes, sir."

And the Member here, I can see the drama of the court room at this moment, the member just took him away from me, and he said:

"I don't understand what 1933 plays in your mind as to the elimination of the New Jersey Company at or prior to 1933."

And the witness answered:

"Mr. Welch has had me at a theoretical director's table, and I would have considered long before 1933, Your Honor, had I been at such a directors' table, that the New Jersey Company played no useful function in the Chicago Stock Yards enterprise, being virtually nothing but a conduit from which money flowed from operating companies up to the Chicago Stock Yards Company, and I would have tended to eliminate that because of the nuisance that might be created by a minority common stockholder, even though his 9 per cent dividend was guaranteed. There would be a question in my mind as to what he might do after 1940.

"The Member: Aren't you interjecting an entirely new suggestion now than heretofore? As I understood, the alternative suggestions have been as to whether the New Jersey Company should be liquidated or elim-

inated, as you speak of it, at the expiration of its charter in 1940, or should be refinanced and by some means or other projected into the future. Now, do you mean to add to that alternative suggestion the third suggestion that it should, indeed, have been eliminated long prior to the expiration of its charter in 1940?

"The Witness: It might well have been eliminated prior to that time, the elimination being timed when the refinancing of any obligations that it had outstanding would be comfortable, would be accomplished under normal financial conditions.

"The Member: Well, do you take 1933 as that time? Is that why you said 1933?

"The Witness: No, sir; I don't consider that 1933 would have been a good time to do it, but I would have considered that in 1933 the company might well have looked forward to doing that, when we had a normal market for the sale of bonds and high-grade fixed interest-bearing stocks, which I think in '33 was—at the end of 1933 was certainly in reasonable prospect within two years, if not earlier.

"The Member: Well, now, then, as I understand what you intended to have me understand was that during the years 1930 to 1933 it would have been the part of wisdom for the corporation to have contemplated the earliest elimination of the New Jersey Company when financial conditions permitted?

"The Witness: Yes, sir.

"The Member: Not to wait until 1940?

"The Witness: Yes, sir.

"The Member: And certainly not to project it beyond 1940?

"The Witness: Yes, sir."

And the Member, still almost incredulous, said:

"The Member: Is that the situation?

"The Witness: That is."

Now, as I read this testimony here, my mind went back to those days in the court room when the Government experts took the stand and when one after the other had substantially this colloquy with me and of course I have greatly shortened it but it is substantially this colloquy:

Dr. Atkins, you would not have declared out all of this company's earnings in the years of 1930 to 1933, would you? *A.* No, sir.

Q. You would have accumulated some, wouldn't you? *A.* Yes, sir, Mr. Welch.

Q. How much, Dr. Atkins? *A.* Never less than half.

Q. And for what purpose, Dr. Atkins? *A.* For the purpose of liquidating the Jersey Company in 1940.

Dr. Friday takes the stand and I have the same colloquy:

Q. Would you have accumulated in the years here in question, Doctor? *A.* Oh, yes, Mr. Welch.

Q. How much? *A.* Never less than 30, sometimes 66 2/3.

Q. For what purpose, Doctor? *A.* For the purpose of liquidating the Jersey Company in 1940.

And Merriman comes along and I have the same colloquy with him, and when I reached the question:

Q. For what purpose, Mr. Merriman? *A.* Liquidating the Jersey Company.

Q. In 1940 as between the Member and myself? *A.* Oh, no, not 1940, necessarily, I would do it before, if I got the chance.

Well, if I may ring in a slightly personal note, if I ever succeed in ultimately losing this case I shall find myself in the position of a lawyer who had all of the evidence from both sides his way, and I shall be in the unenviable position

of having conducted myself with such incredible and beautiful ineptness that I lose a case that just could not be lost on the evidence.

Every one of the Government witnesses gave me three cheers, and said, Surely we will liquidate the Jersey Company, and the only difference he had with me was, that he thought that he would save a little less and hope to borrow more, which hasn't anything to do with the purpose. He said, the purpose to save, and the liquidation was sound, and if some day my clients have got to write a check for five or six million dollars because this case was lost, I will be in the unenviable position of representing a client who wrote a check in that size, including interest, who did not owe that tax any more than I owe it, and I don't envy myself in that position, but I might add that I still hope, with the gorgeous hope that I am never going to reach that position.

That leads me to say one other thing. I don't suppose that there could possibly be a member of this Board who joined that majority without reading all of this record. I say that because I just would not want to practice law before this Board unless I knew implicitly that every member of this Board has read this record. I do know, however, that you are often sent to far parts of the country; a long assignment, and I know the great pressure of work under which you all labor and through you gentlemen who sit here I send a message to any member of the Board who has not read this testimony, and when this argument is printed, as I mean to have it printed, and circulated, I think that I may print this in red:

If there is a member of this Board who is so far afield or so pressed with work that he has not read this record, I beg him to read about a hundred pages only, and I don't ask him to read the testimony of my friends, I ask him to

read the testimony of my enemies; let that member, if there is such, read Merriman's cross on pages 827 to 908, and let that member, if there is such a member, read all of Dr. Friday's testimony, pages 1071 to 1105.

Now, I think everybody in the court room will be relieved to know that I am approaching the end of my argument. What is the present situation as we stand here?

It is that the Board has solemnly said, We just don't believe this story about the Jersey liquidation, and we just don't think the plan is reasonable enough to command the respect of intelligent men.

Now, I have done a good deal of thinking about how the Board could have reached that conclusion. To do so meant that they had to disbelieve, as I view it, not only my witnesses but the Government's witnesses.

Well, thinking of my own witnesses, I thought about demeanor—that is a good ground to disbelieve a witness, if he acts shabbily on the stand, and so if the majority wishes to disbelieve all of the statements of Mr. Prince's intentions that were put into the record one after the other, they could do so on the ground of demeanor, that the witnesses just did not seem convincing.

Another ground that they could do it is on the ground of interest, and bias, and they would say, and on the whole it would be true, all of the witnesses are employees of the enterprise, and you would not expect them to come in and say things that would hurt the enterprise. I am inclined to discount the testimony for that reason.

Or you could say, finally, Well, the story is just so unreasonable it does not permit belief anyway.

That seems to be, as I have thought about it a lot, that seems to me the only way that the Board could have disbelieved these witnesses.

Now, to go back to demeanor: I venture to suggest that

no member of this Board would wish to decide against the listening member on demeanor because you just can't judge it from a written record, and I have dismissed that. I am convinced that the majority did not disbelieve my witnesses because of demeanor.

Well, then, I thought of interest and bias, and I said: It is only fair to say, Welch, you are a little bit vulnerable there because they were all men having to do with this enterprise. I will admit that they were men of stature and they impressed me but then I am easily impressed with my own witnesses, and this business of interest and bias seems so closely related to bearing on the stand, that I thought the majority ought to go along with the minority anyhow, because they are so closely related.

And then I remembered that there was one perfectly unbiased witness, and that was Mr. Walker, whose testimony I have already read, who said, I can almost quote it verbatim, he was, you remember, the expert, you might well have missed his testimony because it was tucked in at the end of an expert's testimony, and he said:

"There can be no question about Mr. Prince's plan, he has told it to me many times. It was to eliminate the Jersey Company, and to save up cash with which to do it."

Now, Mr. Walker is a partner in Kuhn, Loeb & Company. Some of you men may remember that he played a fascinating and public service role in the Giannini bank situation in California. He is a man of stature. The record discloses no interest of his in the outcome of this case, and indeed there was none and could not be, so I was inclined to say, Well, the Board can't disagree with or disbelieve all of my witnesses because of interest, because of Mr. Walker, and then I was forced to the last thing, that you must have disagreed that the Jersey Company was going to be eliminated

because it just seemed unreasonable and fantastic and you and the majority practically said so in its opinion.

Well, I was pretty despairful about that. I could not tell it in the court room any more than in the sense of a plan, or a hope that we had all of these years that we meant to carry out, but now, what has happened?

The long delay between the trial and the decision just happened to be such so that what the Board thought was this incredible thing that would not happen, did happen. The Jersey Company is in liquidation, and the date on which it went into liquidation seems to be of some importance.

The decision in this case was on March 20, and if Your Honors when we all leave here will look at the McDonough affidavit, on page 10, you will see that eight days before this decision came out a report went out, and if Your Honors please, you will find it on page 10, eight days before the decision came out, a formal notice went out to every stockholder of the Jersey Company, which said in substance:

"Dear Stockholder: This company comes to an end on July 10, it will cease to do business, and will continue only for the purpose of liquidating its capital."

That as I say, was eight days before this opinion came down. Similarly eight days before the opinion came down the liquidation was actually embarked upon, and the first call on the Maine treasury was made.

That was a call for $4,000,000, saved up, so my witnesses said, for this very purpose, and that call was later increased to $5,000,000.

Seven days after the opinion came down, the $5,000,000 moved from Maine to the Jersey Company, and ten days after the opinion came down the trustee of the Jersey bond issue had $14,000,000 placed in his hands to pay off the issue.

Between the date of the trial and the date when Mr.

McDonough made his affidavit, the Maine Company acquired 29,000 shares of preferred stock to put the liquidation through, as it said in this court room that it intended to do, and those 29,000 shares of stock, by the way, were acquired all during the period of time after the trial of the case here, and before the decision came down.

Now, on the second affidavit, as presented to Your Honors this morning, the Jersey liquidation is practically accomplished. This is July 18. Eight days ago the Jersey Company ceased to do business, and it no longer has a Board of Directors as such. They are now merely liquidating trustees, and they are liquidating its affairs.

Now, what is the position of the Board?

If this motion of mine to reopen this case and put in this cogent evidence is not granted, the position of the Board will be this:

It will have decided this case on the basis that a plan for liquidating the Jersey Company either was not honestly entertained and adhered to, or else was so fantastic as not to command belief of men like yourselves, and yet as I stand here, the thing has happened. What my witnesses said would happen, has happened and certainly no member of this Board wishes this decision to rest upon the assumption by the Board that something just would not happen, that you could not believe it would happen, when in fact it did happen.

Now, I don't even know, Mr. Clark, whether my motion to add this evidence to the record is seriously opposed or not. I could imagine that it might not be. It seems to me that the situation of Mr. Clark is not unlike that of a district attorney who has secured conviction of a suspected person and then upon a motion for a new trial has before him an affidavit of unquestioned veracity in which somebody

else confesses to the crime for which somebody stands convicted.

It is my guess that Mr. Clark's position is not unlike that of the district attorney, and that he would not violently or passionately oppose the reopening of the case for the purpose of taking this evidence.

Now, what I have said leaves little to be said on the other two motions, which I said that I would deal with at the end.

There is a motion for re-argument of the case. Naturally when the new evidence is introduced there will be an argument as to its effect at that time. I should suppose that that motion for re-argument might well be granted at this time, or held in abeyance. I don't care much. Naturally an argument would follow when the new evidence is introduced.

That leaves only the motion for additional and substituted findings, and once more that can not adequately be dealt with until this evidence is before you, so my suggestion and my very earnest prayer is that Your Honors will allow the motion to reopen the evidence to show that what you believed would not take place did take place, which will allow the motion for re-argument which would be natural any way, and that you will leave in abeyance the motion for additional and other findings until such time as that evidence is received.

Member Smith: Mr. Welch, the conclusion of the Board was predicated upon these propositions:

That the Maine Company is a mere holding or investment company—that is the first basis;

And the second basis was that it permitted its gains and profits to accumulate beyond the reasonable needs of the business; and

Third, that this was done with an idea on the part of the principal stockholder to escape surtax.

How would the inclusion of this additional or newly discovered evidence into the record change the actual result?

Mr. Welch: Because if Your Honors please, in this case as in all cases, you must go to what you have often called the deeper question. Use the presumptions if you wish. I never cared whether they existed or not, when I argued, I said I don't really care whether you think we are a holding company, I have got the evidence on the intent and everyone agrees with me, and my evidence is that the earnings were allowed to accumulate not for the purpose of avoiding the surtax, but for the purpose of liquidating the Jersey Company, and every Government witness has said to me that if he sat in Mr. Prince's position, he would have done exactly the same thing.

I said that I have shown affirmatively that the intent to avoid surtaxes did not exist, and I have shown you what the intent was, and everybody has agreed with it, that it is honest and reasonable and decent intent and I don't care whether the presumptions are here or not. I am dealing with the heart of the thing, the ultimate thing, and now the test comes here.

I could only promise, so to speak, that we meant to liquidate the Jersey Company, and that is why we were saving funds, and now the promise has been fulfilled, and I don't see how, in all humility, I don't see how it is possible for this Board now to conclude that those earnings were accumulated for any other purpose. They have been used for that purpose, just as the witnesses said they would be.

Member Smith: They were accumulated at least in part and in large part to buy up the shares of stock of the Jersey Company, which of course were not liabilities of the Maine Company or of the Jersey Company.

Mr. Welch: But you can't control the destiny of the

Jersey Company in 1940 unless you are a stockholder. Your Honor is back now on the hit and run theory. If you are going to control the destiny of the Jersey Company you have got to own its stock, and you have got to own both preferred and common because they both vote.

Member Smith: Do I understand that this motion that you have been arguing, if it is granted, that at the same time or at a later time you are pressing your other motions?

Mr. Welch: I have already been informed by Mr. Grimes, I think I am correct, that the Board as a whole would consider the motions that have been made and the argument in support of them. I may be misinformed but it was my thought that this motion being a very critical one as I view it would on some occasion, perhaps not within 30 days or so, be passed on by the Board, and that the Board would then say, All right, Mr. Welch, will you kindly come to Washington, setting a date, and present the evidence that you say you have.

Member Smith: Mr. Clark.

Mr. Clark: Of course, Your Honor, we very earnestly oppose the motion. So far as re-argument is concerned, Mr. Welch has gone a good deal further than I had anticipated this morning and it seems to me that really he has re-argued the case as he sees it, and from his point of view. I want to address myself, except to such extent as Your Honors may wish definite replies to such questions as come up, particularly to the proposed receipt of this evidence, which I believe is not proper and is of such a character that not only it does not properly belong, but it is inadmissible material and has no bearing.

Now, although—and I think Mr. McDonough states this in his affidavit, although it has come into existence since the hearing, it is not newly discovered evidence in the sense

that it was evidence then existing, which was unknown to or unavailable to petitioner. It just was not there.

Now, here it has come into existence, and why and how can it be taken in and of itself, as any adequate support for an intent which was supposed to have been born in 1911, or thereabouts, and relative to which there is a great mass of documentary evidence before the Board?

Mr. Welch, as I think would be quite natural with him, a highly capable trial lawyer and jury lawyer, has his mind set right on the oral testimony and the record thereof. I think that he fails to realize, perhaps, or at least does not find it necessary to emphasize at this time, the intent and purpose which is derived from inspection of that documentary evidence, from the conduct of the taxpayer, and of Mr. Prince as disclosed thereby, and on which the Board has commented and on which it has relied to a very great extent in its opinion, and most properly so.

There is also this to be borne in mind in that regard. In considering the National Grocery Company case, the Supreme Court dwelt upon a situation no doubt somewhat similar to this, and said in the last paragraph of its opinion:

> "The Court expressed the opinion" (referring to the Circuit Court of Appeals, of course)—
>
> "The Court expressed the opinion that the Board failed to consider relevant and controlling facts, that it relied upon improper evidence in reaching its conclusion, and that it failed to make the findings required by the statute. There is nothing in the record to justify that view. The findings quoted above are specific. The Board was not obliged to accept as true Kohl's statements of his intention and purposes or to accept as sound the opinion of his experts. It was error to reverse the decision of the Board."

Now, of course, when one is representing the Government in tax cases, one is constantly confronted by witnesses who quite honestly, no doubt, and I am not intimating anything to the contrary, quite honestly find that their intent as they can set it forth in words was such as to be of material assistance to them in a tax case which is in hearing at the time.

We have nothing to refute that in the way of testimony. We can't produce witnesses under any ordinary circumstances who can refute their flat statements as to what their intent is, and we have to resort, as we do all the time, to what is shown by the records of transactions which have taken place, and outside circumstances which make it unreasonable to conclude that statements of these witnesses as to their intent is really the last and determinative factor.

Now, in regard particularly to these documents, as I say, they all record transactions and corporate meetings, votes and activities which have taken place after the prior hearing.

Now, perhaps I am wrong but it certainly is not my idea of a rule of evidence that that is newly discovered evidence. It is evidence newly brought into existence, and I don't think it is admissible right on that ground. Certainly nothing that transpired subsequently to the date of the Board's opinion could properly be admitted in evidence, in my point of view, and now let us see, perhaps, why all of this has transpired? There is comment by my brother, and reference to testimony of some witnesses, to the effect that the Jersey Company might well be liquidated in 1940 or might well have been liquidated prior thereto.

Now, up until 1936, the liquidation would have resulted in a very heavy tax payment on the part of the Maine Company, so in that respect there was a change by Internal Revenue Code 112 (b) 6.

Member Smith: That was in the 1936 Act. I didn't have

it at the time that I wrote the last three or four paragraphs of the opinion.

Mr. Clark: That altered the situation, then, and merely made it necessary for the Maine Company to acquire a total of 80 per cent of all of the voting stock of Jersey Company, in order to be able to make it tax free on liquidation, but there certainly would not be any reason to suppose that prior to 1936 anything that now transpires or now is ready made, can be treated as in support of an intent said to be born in 1911, when a liquidation at any earlier date than 1936 would have led to this heavy tax liability and there was nothing to indicate that the 1936 Act would make this change which would permit the company to so liquidate in 1940.

Member Opper: May I interrupt you, Mr. Clark, to ask you whether that was in the mind of the Government's experts when they testified with respect to what would be sound practice?

I am referring now to that part of the testimony that Mr. Welch quoted and referred to. As I understand that they were talking about these very years, 1931 and 1932.

Mr. Clark: Yes, sir.

Member Opper: And at that time, if I understand, it could not have been known that this would be a tax-free liquidation but nevertheless as I understand it no reference to that as a reason for withholding the liquidation was made by Government's own experts, and no disagreement was expressed with the idea that it should be liquidated in 1940 or before, is that correct?

Mr. Clark: Yes, sir, I think that that is correct.

Member Opper: Have you any explanation for that?

Mr. Clark: I think this. I think in the first place we have to keep clearly in mind what to me is the real point at issue here, and that is whether this is Prince, who is acting

throughout in his own behalf, or whether he is Prince acting as president of the Maine Company in all regards, and whether the Maine Company consequently can be said to have all of this plan in mind, and to be intended to be the instrumentality by which it should be accomplished.

It is relative to that where I think the expert witnesses perhaps in their thought or theory and their replies to questions, took the attitude that this was all being done by the Maine Company when according to my contention it was all being done by Prince.

Member Opper: But your own, Government's own experts, took that position?

Mr. Clark: The Government's own experts, it is true, Your Honor, stated that they saw no sound reason for the continued existence of Jersey Company but they also stated, and it appeared in the record, and I think it was read by Mr. Welch in some of the expert testimony that he read, that it could be refinanced.

They simply felt that in that set-up, there existed no particular reason that they could see for keeping the Jersey Company alive, but that did not mean, as I take it, that they felt that it would be a reasonable and proper thing for the Maine Company to get in the Jersey Company and swallow it whole in 1940, tax-free, for the benefit of Mr. Prince. It would be fine, perhaps, if it could be done but I don't think that there is anything in their testimony that would lead to that conclusion.

My attention is called to the fact that instead of liquidating or taking a step in that direction, a step in the contrary direction was taken in 1932, when F. H. Prince & Co., Inc., came into the picture. I don't at the moment remember how much of the stock of the Maine Company went into that corporation's hands and I don't think it is material but it was a substantial amount. I am told 60 per cent. That is

not according to my own recollection but I have no doubt that my advisor is correct. That means a step taken in reverse direction. That was a step taken toward expansion.

Have I answered what Your Honor had in mind?

Member Opper: I am going to have to leave that to you, Mr. Clark, if you think you have something more that bears on the question—

Mr. Clark: Your immediate question, the one that you are interested in is to what explanation I have for the Government experts as well as the experts for the petitioner being in accord that it would be a good idea to wind that company up in 1940.

Member Opper: As I understand it, indicating that the way to do it was to accumulate earnings in the Maine Company.

Mr. Clark: No, I don't think that that is so, but I will have to have some reference here in order to indicate the contrary, if such exists, and I believe it does.

Member Opper: I may have been unfair in asking that question to this extent but I think it was suggested in the beginning that you were preparing to address yourself only to the question of the admissibility of this later evidence, and if you, under the circumstances, feel that you are not prepared to answer the question, that is something else again. However, I don't withdraw the question as being one that I think is a natural one to ask.

Mr. Clark: I think Your Honor is quite right, and I did not mean to give the intimation that I did not want to answer questions at all but as I did indicate it seemed to me that Mr. Welch had practically re-argued this case this morning and that was something which I did not suppose

was to come up at this time. I had thought we were to address ourselves specifically to these motions, which had been filed. If I can find something here without delaying the Board too long, I would certainly like if I can do it to clear such doubt in Your Honor's mind.

I am very sorry to have to delay here at this time, and I wonder if perhaps I might pursue my original thought, although I would rather follow up exactly what the Board wants in that regard.

I was going to say, to go ahead on my original line as to the admissibility of this evidence, and then pick this up after luncheon or if I had better pick it up now and ask for a recess at this time?

Member Smith: May I ask Mr. Welch, if you want to make any argument with respect to the motion for modification of the facts at this time?

Mr. Welch: I have indicated that I would much prefer to make that argument after action on the motion that I have argued at length, and even if the action of the Board were adverse on my motion which is difficult for me to contemplate, the thing is in such a state of flux that it is an unhappy time to argue that motion now and I would hope to argue it at a later time, no matter what action is taken on the motion to re-open.

Member Smith: We will recess at this time until two o'clock.

(Whereupon, at 12:30 o'clock p. m., a recess was taken until 2:00 o'clock p. m. of the same day.)

AFTER RECESS

(The hearing reconvened at two o'clock, p.m.)

Member Smith: We will proceed.

Mr. Clark: I think just before recess I had not quite understood what the Board member was asking for, and now I think that it might require some more elaboration than I had thought by references to the record, because I was speaking at that time about the fact that we were in another era in 1940 relative to the tax liability which would result to the Maine Company in the event of liquidation on the part of the Jersey Company, and that that era was only created by the 1936 Act.

One of the members asked me as I now think I understand the question, whether I thought that the experts who had testified that the Company ought to be liquidated in 1940, as there was so much conversation relative to this morning, took that into account. At least that is what I understand the member wishes to hear about.

Now, so far as that is concerned, their testimony—I am talking about our own experts now, the Government witnesses now—was predicated on the idea in general that the companies—the words "liquidate" and "refinance" were used, but that either liquidation or refinancing or refunding would have to take place in 1940.

On that point I wish to refer with the indulgence of the Board, to some testimony, a part of which was read by counsel for the petitioner this morning, but there is some more of it that explains much more fully what the real attitude of the experts was, than confining that to the parts which were referred to this morning.

So far as having in mind the tax situation in 1940 as bearing one way or the other on their opinions, I have no idea that the experts were not aware of the situation, and I don't see how they could have testified if they had not

taken that into account, although I can't point to any place in the record where they are directly asked relative thereto. If such a place exists, and there is such a record, I don't know of it at the present time.

So far as any statement that was made by, and I believe it was made by Mr. Merriman, where he referred to liquidation at an earlier date, and I think prior to 1936, I don't know whether he had the tax situation in mind or not, but I would imagine that a tax expert would be the one called in by a business house for careful instruction in that regard, although I do think that an economist certainly would be understood to have in mind the era in which he was living at the time, with reference to a liquidation when he knew that there might be millions of dollars of tax involved; but I can't point directly to the record in that regard.

However, the experts for the respondent, Friday and Atkins, as I understand their testimony, and I think it is pretty clear, didn't mean to bind themselves to statements to the effect that they felt the right thing to do upon a sound business policy and all of that sort of thing was to wind up or terminate or to end the Jersey Company necessarily in 1940, not necessarily at all, and it might not be wise, and I think they said it might well not be wise at all to do that, but that that was one way of doing it, but that there were alternatives; and I think that if the Board will indulge me, I would like to read more at length from the testimony in the first place of Dr. Friday, and I am referring to page 1082 of the testimony, it is the third full paragraph on the page.

> "I have not found much difference of opinion among any of the witnesses. I have read their testimony on this point, and I am in agreement that it should be liquidated in 1940. I am also of the opinion that it is not necessary that it should be liquidated in the sense

that the company of that name should go out of existence; the charter might be renewed and extended; but in my opinion it would be best that it be liquidated."

Now, turning to page 1083 where he goes further, and omitting from the record the intervening material, in the first full paragraph starting on that page he stated:

"Now, I considered the matter thoroughly and decided that the most that could be set up, in my opinion, as reasonable needs was an amount which would enable the Maine Company to liquidate these bonds and debentures and pay the debts of the company in 1940, and that would require that $23,963,000, as is shown in the first column, that between 1930 and 1940 certain of the bonds that were outstanding here would have been paid off, particularly the Chicago Manufacturing District bonds, which are serial bonds, and, as I remember, the serial bonds would have extinguished this completely by 1940. But taking this figure of $23,963,000, if the company has that much money on hand in 1940, or assets which can be completely converted into money, then it can pay them off, in which event the collateral behind these 14 million dollar face value of bonds of the New Jersey Company would be released. Now, that collateral consists of the entire stock, as I remember it, of the Chicago Stock Yards and Transit Company and also of the entire stock of the Railway Company, which owns the lease, owns the road, and which also owns the lease to the New York Central, which yields $2,000,000 a year, all told. Such an item of collateral, free and clear of the debt, and yielding the income that it does, the company would not have the slightest difficulty at all in obtaining financing if the Maine Company with which to take care of the preferred stock, which only amounts to $6,500,000, and with which to

redeem such common stock as may still be outstanding at that time. The difficulty or the needs that confronted the company during the years, from the standpoint of making a smooth transition from the old organization into the new one, this company would be kept intact without any embarrassment of any kind.

"So, it appeared to me that the needs for the ten years from 1930 to 1939, in preparation for 1940 were rather moderate, and that the retention of the amount of earnings, such as was retained in 1930 and '32, was beyond the reasonable needs of the business."

And then referring to Dr. Atkins' testimony, beginning at page 984, I don't recall whether Dr. Atkins was under cross-examination or direct at the moment, let me see if that is shown. That was direct examination, it is the second complete paragraph on the page. It is a question.

"Q. Dr. Atkins, you have either heard or read the testimony to the effect that a large accumulation of gains and profits had to be kept by the Maine Company because of the necessity to meet the financial obligation of the New Jersey Company in 1940?

"A. Yes, sir.

"Q. In the light of your experience do you consider this an advisable policy?

"A. No, sir; I don't feel it to be an advisable policy.

"Q. What are your reasons therefor?

"A. Because I feel that there are other and more satisfactory ways of meeting that situation. It seems to me as though there are two major ways which might be combined in order to deal with the maturities which will take place in 1940.

In the first place, I am convinced from my study of the stipulation, exhibits, and so on, in this case, that it

would have been wise for the Maine Company to have purchased a substantial amount of the securities whose maturity would arrive in 1940 prior to this date. I think that it would have been wise for them to have pursued that policy prior to the years in question at various times. I think it would have been distinctly wise policy to have made purchases during the years in question, at which times the market prices of these securities were decidedly below par, and, as I indicated yesterday, in December 31, 1929, the Maine Company had large liquid resources, a very substantial part of which was in the form of cash, and a further substantial part, so far as I can learn, in the form of general market securities.

"It would not have been possible with the resources available during these years to have retired all—purchased all of the securities in question, but I feel that if I had charge of the situation, having pursued that policy, as far as the circumstances would reasonably permit, to plan then to refund the securities that were maturing in 1940, and, thus eliminate the necessity of accumulating funds in this way, pay them off in full.

"The Member: May I ask you to elucidate what you mean by refunding after you said they couldn't have been purchased?

"The Witness: I mean by that to retire, pay off these securities by the issue of new securities from which funds might be obtained for the payment of that portion which had not been acquired.

"The Member: You mean the kind that could not have been bought?

"The Witness: Where there was not sufficient funds to have bought them during this period.

"The Member: Were they callable? Could they have

been refunded before their maturity if they couldn't have been purchased?

"The Witness: No, Your Honor, not the New Jersey bonds. They were non-callable, I believe. Apparently I haven't made myself entirely clear.

"What I meant to indicate was that I would arrange for their refunding of any amount not purchased at the maturity of the bonds.

"Have I made myself clear there?

"The Member: Well, I think I understand what you say. Do you mean that although the issue would have been outstanding as an issue with some of them not purchasable because they weren't available for purchase, nevertheless you would have purchased those that you could have purchased and refinanced that part; is that what you mean?

"The Witness: And refinance the part which I could not purchase before 1940, in 1940, at the time of the maturity. I am not suggesting to call in the bonds which I understand were non-callable, but what I want to say, trying to say, is that I would have purchased all of the bonds which the circumstances would have made reasonably possible, giving due consideration to all of the various factors, immediate consideration; and the maturities of the bonds which I had not purchased, I would have arranged for their refunding, refinancing at the maturity date.

"The Member: At the maturity date?

"The Witness: Yes.

"The Member: In 1940?

"The Witness: In 1940. I would refinance what I could not purchase in the meantime, those I had in my possession.

"The Member: Well, you have to refund those if

you are going to do anything about it in 1940. You have to pay them. You have to redeem them in 1940, don't you?

"The Witness: Yes, sir.

"The Member: I don't get the thought about refunding them in 1940 if the corporation is going out of business. It is, isn't it, in 1940? The bonds are going to mature, become due.

"I don't understand what is meant by refunding those bonds of the forthcoming extinct corporation.

"The Witness: I will see if I can make myself clear in that regard.

"As I understood the question, it was whether or not I would attempt to accumulate in the treasury of this enterprise sufficient cash funds for 1940 so that when those bonds matured in 1940 I would have sufficient cash in my treasury from the accumulation made up from earnings during this period, reserved for that purpose, a sufficient amount to pay off those bonds, and I indicated that in my opinion I would not attempt to accumulate the full total amount, pay off those bonds at maturity. On the other hand, what I would do would be to purchase currently during this period bonds as they might become available, and as funds might be available to be used for that purpose, as many as I could, giving due consideration to those circumstances, and that in 1940 when the bonds matured I would arrange to pay them off from funds obtained by the issue of new securities.

"The Member: Is that all you meant by your expression of refunding the balance?

"The Witness: Yes.

"The Member: Yes, all right."

This is the way the testimony in the record runs, in any event.

"The Member: Yes, all right.

"The Witness: I think so. That is the result I was trying to obtain."

Now, on page 989:

"A. (Continuing) It seems to me that this procedure which I outlined is a perfectly possible and reasonable procedure to follow, and one which would be to the best interest of the enterprise.

"If I may refer to some figures to indicate why I think this would be possible, I find that in the treasury of the New Jersey Company is a block of Indiana Harbor Belt 4's, par value of 2½ million dollars. Upon the payment or refunding of this issue, those bonds will be released and available for disposition, sale.

"I also find that on December 31, 1933, there were loans by the Maine Corporation to Mr. Prince, which I understand were liquid loans, and he was presumably in a position to repay, thus placing the Maine Company in funds.

"I also find that the Maine Company at that time had cash of $7,500,000. I made reference to the other investments by the Maine Company. Presumably they were general market securities. And I made no reference to any of the other liquid assets of any of the other companies of this group.

"The total of those amounts would be, in round figures, 15 million dollars at that time.

"I find that maturing in 1940 were 14 million of the New Jersey 4's and 5's.

"I find that maturing in 1945, but guaranteed by the New Jersey Company, $2,327,000 of Elevated Railroad bonds, which presumably would demand consid-

eration at that time. And I also give consideration to some other securities, which might or might not demand consideration, depending on the action taken.

"The New Jersey Company preferred stock of 6½ million, and Maine bonds of approximately—outstanding in the hands of the public, amount to $3,200,000. And I also put in a figure in excess of $300,000 to represent the value at the approximate market price of the nine dollar guaranteed common stock of the New Jersey Company in the hands of the public, making a total of $26,850,000 in round figures.

"Now, one of two courses of action, it seems to me, will be possible: One is to continue the New Jersey Company by procuring a renewal of its charter, which, while obviously not sure at this time, nevertheless seems to me to be a matter which reasonably—a consummation of which might be reasonably contemplated, if it should be desirable.

"Mr. Welch: You say should be desirable?

"The Witness: If it should be desirable.

"Mr. Welch: Yes.

"The Witness: No definite bar of the decision is made in that respect.

"Mr. Welch: I see.

"The Witness: Another possibility would be the elimination of the New Jersey Company and the assumption of its assets and liabilities by the Maine Company.

"I confine myself to those possibilities, although I think there are others which might be employed.

"If these liquid assets which I referred to were devoted to the retirement of the securities in question and other funds obtained from refunding were obtained to meet the difference, an amount of 12, 15 million dol-

lars might be required. This, it seems to me, would be perfectly reasonable to anticipate, obtaining through a refinancing operation, which, if consummated, would eliminate the debt, the present existing debt, of the New Jersey Company, the Maine Company, the Elevated Company, leaving no debt against them, and making it possible to use the stock of the Transit Company, the Railway Company, and, in addition, if desired, the stock of the Produce Terminal Company and of the Central Manufacturing District as security for obtaining these funds. It does not appear to me as though it would be necessary to use all of these securities as a basis for this refinancing operation.

"The Member: Can you tell me briefly what you mean by refinancing?

"The Witness: By the Sale—I will put it this way: When bonds mature and become due, it is necessary, if the company is to remain solvent, to pay them off. One of the ways in which funds may be obtained for paying off securities that are due is to buy an issue of other securities, from which funds might be obtained. If this is done in collateral or other assets which may have been used to secure this issue, they are released and become available as securities for the new issue.

"The Member: Is that what you mean by refinancing?

"The Witness: Yes.

"The Member: Now, cannot that be stated, in the layman's language, as substituting new creditors for the old ones?

"The Witness: In the layman's language, yes.

"The Member: What is the point in that? What is the point of liquidating the debt of A by borrowing money from B to create a debt to B?

"The Witness: Because—

"The Member: Generally speaking, that is what you mean by refinancing?

"The Witness: Yes. That is, Your Honor, constantly being done, particularly in the case of industries of various kinds, where the investment in them is of a relatively permanent character.

"We can see that, of course, in—take an illustration from an industry outside of this field, the public utility field, where they constructed a large generating and distributing system for electric power. The expectation is that that system will continue for an indefinite time. Funds to create this system are obtained by the sale of bonds with a maturity of relatively a short number of years as compared with the expected relative durability of the generating and distributing system.

"The Member: Well, that is because you are changing the terms of your indebtedness, substituting for a present indebtedness which has terms which you regard as, to some extent, unfavorable, substituting for that an indebtedness with terms that eliminate some of those unfavorable terms, and on the whole, are regarded as more favorable under the particular circumstances then existing. Is that what you mean to say?

"The Witness: No, because from time to time your indebtedness matures at a period when business conditions are such that it is necessary to obtain capital, obtain funds from a new creditor to pay off the ones due the old creditor on terms which are not so favorable as the terms on which the funds were obtained originally. You may better your terms or you may find your terms worse. The terms on which you can obtain your credit will depend on two major factors, the gen-

eral business and economic situation and the position of the borrowing corporation.

"The Member: Yes, but I am talking about the voluntary substitution of one indebtedness for another. You can only do that when the terms of your new indebtedness could be an improvement on the terms of the old.

"The Witness: That is true, sir, but here we have a definite date, 1940, when you have no choice in the matter. Your securities mature at that time. You will have to pay them off.

"I included the Maine bonds in this consideration partly on the assumption that the terms of the indenture, if I remember correctly,—if the New Jersey Company is not kept alive, the maturity of the rest of the bonds, I believe, will be in 1961; and I am including the other Railroad Company bonds in my consideration because they are guaranteed by the New Jersey Company, although they do not mature until 1945. Nevertheless, if the New Jersey Company is to be liquidated then it is necessary to make provision in some way for those bonds.

"I have given consideration in my study of this matter primarily to the financial considerations and not to a certain legal consideration as to the best state in which to incorporate, et cetera, and items of that kind."

Member Kern: Mr. Clark, what point do you wish to illustrate by the long extract that you just read?

Mr. Clark: The point, Your Honor, is that it is not fair to infer that all of the witnesses—I mean, the statement in the record that all of the witnesses said that the Jersey Company had to be liquidated in 1940 and recognized that fact. What they did state, of course I have to go to lengths

for which I am sorry, but what they did state was to the effect that if it was not liquidated these bonds would have to be refinanced, they might be refinanced or refunded or extended but there isn't the flat four-square statement by these experts that the company would have to be liquidated.

Member Kern: Liquidated in the sense that all of their securities would be paid off in cash?

Mr. Clark: Yes.

Now, I was speaking about in what I was saying relative to the admissibility of this so-called newly discovered evidence, I was referring to the time at which it came into existence relative to the situation of the case before the Board, the tax liability situation as it had changed and developed in 1936, so that liquidation could be made to the Maine Company without a very heavy taxation which would have resulted prior to 1936 and the intent which nevertheless had been testified to that this should be so liquidated in 1940, and it seems to me that even if otherwise it were in any way advisable that this can not be admitted as in support of a plan which was supposed to have been in existence for or at least which was argued was in existence from practically the inception of the corporation which was in 1911.

During all of those years, for example, as to one of these factors, the heavy imposition of taxes during the years when there were taxes in effect would have resulted. There was never any time after taxation statutes came into being, when there would have been a tax-free distribution until 1936. In that regard, and I am reminded to digress just for a moment, the point was made this morning as to a statement in the Member's opinion, at the bottom of page 33, and the top of page 34, about the transfer by Prince to the Maine Company of 17,000 shares of stock, and he was therefore relieved from payment of surtaxes. Counsel for

the petitioner then brought up the accountants' statement referring to page 12 of the findings of fact, that the Maine Company became indebted to him, and had to pay him interest thereafter, and that that really resulted in an increase of tax.

Now, as a matter of fact, it is interesting in that regard to note what taxes Mr. Prince actually paid during those years. This only continued through 1926, this situation, continued, I think, and it transpired in 1918, and in 1918, and I am referring now to the personal income tax returns of F. H. Prince, those are Exhibits Triple-C, Respondent's Exhibits Triple-C to Triple-T, in 1918, to be sure, Mr. Prince did pay a tax of $1,883.30.

In 1918 he paid nothing; in 1920 nothing; in 1921 nothing; in 1922, nothing; in 1923, $107.25; in 1924, $1,575.77; and in 1925 nothing; and in 1926, $5,613.50.

So that in fact it can scarcely be said to have increased his taxes in any way during that period.

Member Kern: Well, would his taxes have been any greater if the transfer had not taken place?

Mr. Clark: No, sir, that is true enough.

That, in general, is what I have to say on the grounds of the direct materiality or immateriality of this evidence which is now presented but there is another point which we have to keep in mind, and that is what the plan was in the first place, whose plan it was, and what there is in the record aside from the direct statements of witnesses, or including the direct statements of witnesses, as to the initiation and the purpose and incidence of that.

Member Kern: May I interrupt a moment? It is hard for me to get in mind what your point originally was before the reading from the record.

Was it to the effect that the petitioner could not have had this plan of liquidation in mind in the three taxable

years because during those three taxable years a considerable incidence in tax would have resulted from such a liquidation?

Mr. Clark: I do not say, could not have had it in mind, Your Honor. I said that there would have been a large tax incident to it at that time and what I have been trying to do, I understood the testimony was to the effect, and had it reiterated this morning, that this plan began back at about 1911, about the time that this corporation was instituted, and that that plan had always been in existence.

What I offered that for or commented in that regard was that it actually would have resulted at any time during these taxable years after it had been inaugurated, when taxes were not in effect, would have resulted in those years in a substantial tax payment.

Now, the bonds, it would seem to me bonds, if acquired, the normal way to approach this situation instead of buying any stock, if the bonds, the emblems of indebtedness had been acquired during this period you would have something to support the attitude of the corporation, or the attitude of those testifying as to the corporate activity that there was in connection with this plan and there were not any of those bonds bought and there was not even control of the voting stock bought. There was a substantial purchase of shares of stock, of common stock; there was practically none of the preferred stock that was purchased.

Member Kern: To try to summarize again, is it your position that the plan as originally formulated if it was formulated in 1911, might have been considered reasonable then because there would not have been any tax incidence but that since the adoption of the 16th Amendment and the passage of various revenue acts made such a plan subject to a tax incidence, and therefore it ceased to be reasonable during the time that there would be a tax incidence and

therefore the petitioner must be considered as having given up the plan because no reasonable taxpayer in that position would have retained a plan which would have entailed the payment of taxes?

Mr. Clark: I do think very surely, Your Honor, that the taxpayer would certainly have given careful consideration to some other means such as refinancing and refunding so that he might have avoided that tax situation in 1940 which was not in existence at that time, according to the evidence.

Yes, I certainly do, and there wasn't anything to indicate that this liquidation could have been accomplished without a tax liability up to 1936.

Member Kern: Therefore it would be unreasonable to keep on under that plan because of the fact that they might have to pay taxes, is that correct?

Mr. Clark: If you are going to run into what as I understand would be some 3 million or 3½ million, I have not figured it definitely, of taxes under the prior laws, I would think that it would not be a very wise course to pursue and it is one of the things which seems perfectly reasonable to make one feel would have led Mr. Prince to pursue another course, which he could have done in refinancing and avoiding it, yes, sir.

Member Kern: Was there anything in the record which would indicate that Mr. Prince ever had in mind taking the alternative which you maintain is a reasonable one?

Mr. Clark: You mean in the way of oral testimony?

Member Kern: Yes.

Mr. Clark: I don't at the moment recall anything.

Member Kern: Is there any documentary evidence to the effect that he ever contemplated taking the alternative which you commend as reasonable?

Mr. Clark: Well, now, I will have to stop for a moment and think on it. There is nothing to which I could refer

which would definitely appear to commit him in that regard. It would be merely inferential, so far as I could remember.

Oh, I must refer to something, yes, it is so easy to forget and in fact it is hard to remember that. Just a moment, if you please.

Yes, of course there is this factor, and it is commented on, I am very sure, in the Board's finding, that in 1911 in Exhibit S-42, which is attached to the stipulation, there was an indenture entered into between the Maine Company and the trustee, it seems to me it was the Old Colony Trust Company, relative to the issuance of some Maine Company bonds, and I believe it was paragraph 12 or some paragraph well along in that indenture, the Maine Company enters into the obligation to continue, maintain and preserve the existence of the New Jersey Company during this period.

Member Kern: What period?

Mr. Clark: That is just what I should have said but I forgot to. That was 1961 in this case, I think that you are thinking of Jersey Company bonds, which came due in 1945, these are bonds of the Maine Company; but there is an express agreement in the indenture applying to and committing the Maine Company to preserve, maintain, the existence of the Jersey Company.

Now let me see if I can refer or if I can put my hand on the language of that, if it is of interest.

I can't give you the page but it is in S-42.

Member Kern: That is Exhibit S-42?

Mr. Clark: Yes, and the excerpts from that are quoted in our brief, at page 9.

Member Smith: On page 5 of my report, findings of fact, it is stated:

> "On October 2, 1911, the petitioner executed a trust indenture providing for the issuance of $13,000,000 5 percent 50-year callable gold bonds, secured by all the

Jersey Co. common shares owned or thereafter acquired by it; it was required to do whatever might be necessary to maintain or preserve the corporate existence of the Jersey Co., but not to prevent the consolidation or merger of the Jersey Co. with, or the sale, or transfer of its property to, the petitioner."

There is one other item in the record with Mr. McDonough's testimony, it seems that either he or Mr. Prince had consulted counsel relative to the possibility of an extension of charter of the Jersey Company, if it was desired to do so.

Mr. Clark: And they were advised that it could readily be accomplished. I think that that is also in your findings. I don't recall but I think it is.

Was I interrupting?

Member Smith: No, go ahead.

Mr. Clark: Another bit of evidence having the same bearing relative to the bonds of the Jersey Company—now, they were selling below par, through this period, and that appears—it refers specifically to the exhibit now, but I know that such is the case and it can readily be verified and I will furnish that reference if necessary but at any rate they were selling below par, they were selling over-the-counter, and other places, and they could be bought and they were there and the prices in many instances were below par, and sometimes below 90, I think, but on that I don't commit myself because I don't have the figures before me, and the Jersey Company had, as I say, approximately $10,000,000 in cash during the years 1930 to 1933, our taxable years, I think the cash ran something like $6,700,000 to 9½ million, and they didn't go out and buy those bonds then and that does not show a purpose, it seems to me.

Member Kern: Just a moment. It doesn't show a purpose to do what?

Mr. Clark: Did I say the Jersey Company?

Member Kern: No, it doesn't show a purpose to do what, to liquidate by refinancing or a purpose to liquidate?

Mr. Clark: By acquiring bonded indebtedness to have the thing free and clear, but please let me make a correction for the record, because I see I have committed myself to something that makes it meaningless.

Despite the fact that petitioner and the Jersey Company and the subsidiaries had these amounts of cash during those years, instead of just the Jersey Company, as I have said—

Member Smith: Of course, that page 19 of my report there, I show the quotations of the 4 percent and 5 percent bonds of the Jersey Company.

Mr. Clark: Yes, sir, and it is from there that I got my figures.

Member Kern: Well, what plan on the part of the petitioner would you say that that indicated, the fact that they did not buy these bonds when they were below par?

Would that indicate that they were not going to take any steps in 1940, or were going to extend the company?

Mr. Clark: I think surely they would take steps in 1940: they would have to take some steps in 1940 but they, if they were acquiring the stock during these periods, why didn't they use the money to acquire the bonds; the bonds would have eliminated that indebtedness, and that would have been extinguished in 1940.

Member Kern: Proceed.

Member Smith: I might state at this point that I never had any doubt from the testimony in this case, that Mr. Prince and the others in authority here had an expectation all during the years 1929 to 1933 inclusive, to liquidate the Jersey Company. I think that the testimony warrants that, but was not the basis of any conclusion that I reached. If any member of the Board reached a contrary conclusion

from any statement made in the opinion, why it should be corrected, of course.

Mr. Clark: I had the impression that there was an intent to acquire free and clear, but I think that that intent and plan was the plan of Prince and not the plan of the new company, and what the Maine Company was used for, what it was committed to by Prince who controlled it, indicates that it was that to which I was going to move at the moment, and it was not the plan of the Maine Company, but that the Maine Company was used by Prince as a vehicle to carry out a part of that plan.

Member Smith: I could not find from the record any evidence that the Maine Corporation had any purpose except the purpose of Prince, and the company could not have; the corporation can't have a purpose except the purpose of its officers or directors, and I have no doubt that Prince had the idea, I think it was plain all through this testimony, that it was his idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares to pay off not only all of the bonds of the Jersey Company in or before 1940 but all of the indebtedness of all of the other corporations.

Mr. Clark: I think that he intended individually to hold it free and clear of debt. It is just the sort of proposition which could be used to swallow up and get complete ownership, for instance, of General Motors, or of any other enormous proposition, if you had the ways and means to do it, this was as good a way for him to accomplish it from a tax standpoint.

So far as actual liability for bonded indebtedness of the Jersey Company or any of its subsidiaries, that was all specifically disclaimed by the Maine Company, and its indenture of October 2, 1914, it was at that time as you will recall and I think that this has been gone into in the opinion.

that the Maine Company entered into a direct agreement with the Jersey Company whereby instead of having as previously been entitled to all dividends declared by the Jersey Company, in excess of 9 per cent it became entitled to all of the earnings of the Jersey Company in excess of 9 per cent required to pay the dividends on the stamped certificates.

And in the course of that indenture the Maine Company made certain commitments, among those commitments it guaranteed to pay the interest due on the bonds of the Jersey Company, and its subsidiaries, although in fact as has been pointed out in the Board's opinion, it never had paid anything on that guarantee.

But expressly it disclaimed any obligation for the principal of the bonds, so that so far as obligation on the part of the Maine Company, per se on its own account, it just didn't have any.

Member Kern: I would like to interrupt again, and go back, Mr. Clark. I think the course of the argument has had a sudden shift. I understood at first it was your position, that the petitioner could not have intended the liquidation of the Jersey Company, that it was unreasonable to consider that that was their plan, and that the petitioner was used for the accumulation of unnecessarily large amounts of surplus, whereas during these years it was the intention of Prince and the petitioner to not liquidate but refinance, and now I understand the argument to be that the petitioner Prince at all times intended to accumulate and to use that method to accumulate a large amount of cash and then use that cash for the acquisition of the assets of the Jersey Company, which seems to me a little contradiction there.

Mr. Clark: I may not have been altogether happy in the courses that I pursued and perhaps I can make them more consistent and appear so to Your Honor as they are in my

own mind, by saying that what I intended to differentiate was a plan on the part of the petitioner,—my whole drive in this thing, what is in my head and always has been, is that the petitioner was nothing but the creature and as the Board said in the opinion, the alter ego of Prince.

Member Kern: If I could interrupt you, I think the opinion said "Prince, in corporate clothes."

Mr. Clark: There were several descriptions used which carry through the same thought better than I can express it, and with a constant emphasis on the part of counsel for the petitioner, and that having been the dividing line to a large extent as I see it between the opinion of the Board and the dissenting opinion. I say to a large extent, not entirely, certainly, but it seems to me essential to differentiate in that regard because I think it was Prince doing all of this and Prince gets his company to use just for such convenient purposes as he may see fit in the meantime and while I do think that Prince had the intention of getting this, and getting it free and clear, in 1940, what I meant was that the petitioner was not obliged to do that sort of thing, but the mere fact that the charter was expiring in 1940, and consequently that it was not reasonable to suppose that they would have to hold all of this surplus for the purpose of getting this all in.

Member Kern: There is not any contention that there was any legal obligation on the petitioner at any time?

Mr. Clark: No, I think not. I mentioned that particular disclaiming of liability on the principal of the $14,000,000 of bonds merely as an instance where the company or the corporation kept itself deliberately out of that set-up. Prince felt that he had to do all of this, wherever Prince's testimony was referred to this morning, he didn't make any reference to his company; he had to have the money in 1940 for this, and he was going to do this, and I have to do this

and I have to do that—that is what he said, and I don't want to consume the time of the Board with going further on that. I don't mean relative to your question but I mean relative to what has really been the moving impulse in my mind, that Prince just puts his hand in one pocket, and takes out something and passes it over and puts it in the other pocket and he has gotten by with practically no taxes, and the whole set-up has resulted in enormous deprivation of the Government of taxes, which from my point of view should have been paid through the distribution of surplus.

I can't cite a typical case on all fours with this, and while I know my brother is perfectly sincere in his presentation of the case, it seems to me that we can't lose a case because we have the evidence, and we have it here and it is in the record. That is, coming forward at this time and moving to complete the record in this fashion, I don't know how far you would go in taking in events which occurred subsequently to the time of the hearing. It may be customary in cases and I suppose it is in the discretion of the Board, but I had not supposed that newly created evidence after a hearing, and when a corporation is confronted with at least the possibility of having to pay a very heavy tax under 104, I would not suppose that the corporate steps taken thereafter, after the date of that hearing, could be considered as bearing or carrying any weight toward the position of the company before that date, and I would feel that it was not admissible evidence and would be improperly put in at this time.

I think except for whatever I may be able to say to you, Mr. Kern, or if you have any questions, I think that that is all.

Mr. Welch: One or two things occur to me which I would like to mention very briefly. Mr. Clark argues as to whether or not the evidence that I seek to introduce would be actually

admissible evidence if the case were reopened and entered, and on that I just can't see how there can be any doubt. The way you prove a man's intention is either from his statements of his intention or from the acts that he does and performs, which seems to reveal the intention.

Let us assume for example that I am in the possession of a deed to real estate owned by one of Your Honors, and the question of my intention to reconvey is at issue and suppose that evidence is offered and I say to my associate, Mr. Green, from year to year, I am just holding this in trust, I intend to reconvey it. And then suppose that I finally reconvey it.

The act of reconveyance is of extreme significance in supporting the existence of the intention all the way along.

Member Kern: I think that the doubt expressed by Mr. Clark and to which I for one was interested, is not with regard to the admissibility of the evidence as evidence but with regard to the timeliness of its offer, the fact that it is newly created, that the acts have been done after this case has been in the breast of the Board, so to speak, technically before the decision was out but nevertheless after the submission, the acts were done and the evidence was created.

Mr. Welch: I am moved immensely by what you say but only to this extent, it seems to me that what you say goes to the weight, and not the admissibility. I can understand Your Honor's admitting the evidence and perhaps saying, Well, maybe they just did it to be sure.

Member Opper: Isn't one of the rules about reopening cases, the motions for new trial and consideration of further evidence and so on, based on the question of whether if the evidence were admitted it would be sufficient to change the result?

Mr. Welch: Well, I think that nobody ought to come and

offer trivial evidence, and until I heard the Chairman speak just now, or a litfle ways back in the record, I thought of course the evidence was of extreme significance but now I hear what seems to me the very pointed words stated—

Member Smith: Was that the purpose of bringing in this so-called newly discovered evidence, to prove what I stated that I am sure the evidence does support, that is, I think the evidence in the record supports the proposition that Prince and his associates, if he had any, Armour, or away back before Armour got out of the Maine Company but they had it in their minds to use this company to accumulate funds whereby they could acquire the stock of Jersey Company, and also acquire enough money to pay off all of the indebtedness of not only the Maine Company but the Jersey Company and all of the other companies on up to 1940?

Mr. Welch: It all becomes so simple to me as I stand here. If the Board will simply make its finding: "We find that the purpose with which the gains and profits were permitted to accumulate was the purpose of liquidating the Jersey Company," as Your Honor now says to me you do believe—

Member Smith: What I call the liquidation of the Jersey Company, it is more than that, it is the acquisition of the shares of stock of another corporation, and now it seems to me that any holding company can do that but it does not seem to me that that is within the reasonable needs of the business within the meaning of the statute, and I so stated in the opinion.

Mr. Welch: And I argued to you this morning that I think a person can have a fantastic reason for accumulating gains and profits but as long as it is lily white and pure, and that is his real intent and he does not have the intent to avoid the imposition of the surtax, we are just out from

under this law as if it never existed, and that is the question that I wish to take to the Circuit Court of Appeals—

The only reason I am here, if Your Honor please, is I did not succeed in getting you to say in your opinion what you now say so beautifully for me and that is that you believe the intention that I urge existed but you don't think it is a tax-saving purpose. Now, I will go to the Circuit Court of Appeals on that and I will be either right or wrong. Heaven knows I think that I am right but that is all that I want to do. I will put on my hat and go out now, if Your Honor will just make that finding of fact, that the purpose for which the accumulation was made was that of buying the stock in the Jersey Company and paying its debts and owning it free and clear in 1940 and then I will go to the Circuit Court of Appeals and I will be very hopeful, and that is all that I want to do. I just want that finding of fact. It is expressed in No. 16 and No. 17 of the Motion for Additional Finding, and if I can have those two findings; then I have raised the question of law which is to me the very heart of this case.

I think that that is all, and I am delighted at the situation that I now find exists, and the Board is apparently willing to go along with me. I may not win the case in the end but I have got the intention that all of the witnesses testified to and that is what I think is the very heart of the case.

Now, there is one other thing that I want to mention and that is that Mr. Clark did point out one thing in the record that sounded to me a little as if in 1911 someone intended to keep the Jersey Company alive, and that was the covenant in the Maine bond indenture that they would do so. Now, the Chairman in great fairness pointed at once to the other clause which said the pledge hereunder of the said shares, shall not prevent the consolidation or merger of the Chicago Junction Railways and Union Stockyards Com-

pany with or the sale or conveyance or transfer of all or any of its properties to the company, meaning the Maine Company, and any such consolidation, merger or sale may be made under any laws available for that purpose.

Now, the situation that exists at the moment is to me just delightful. The trustee of the Maine bonds is in communication with my associate, Mr. Keeney and says, "We hear you are liquidating the Jersey Company," and we say, "Yes, sir," and they say, "Well, you remember this covenant about keeping it alive," and Mr. Keeney says, "You mean the one that Mr. Welch has just read," and the trustee says, "I am not sure that you have not committed a breach of the Maine indenture, and I think that I will go and hire a lawyer, and ask him," and Mr. Keeney just smiles and says, "You go and ask him, and if he comes back and tells you that we have committed a breach, I will just be amused because I can call those bonds at 105 and I would like to point out to you, Mr. Trustee, that they are five percent bonds and pretty sweet, and they are pretty rare nowadays and I think when you have talked to all of the lawyers you want to, you won't come back and tell me that you think we are in default" and then he adds one little postscript; "But believing I might run into an unreasonable trustee or my client believing that he might or an unreasonable lawyer, we did try to save our funds so that we could pay them if we had to," and they could, I think, if they had to, although I will admit not without some additional borrowing.

Member Smith: Those bonds are callable at 105 anyway.

Mr. Welch: The covenant really has no cogency, particularly when Your Honor points to the other covenant which seems to me to let them out if there is a consolidation or reorganization.

Now, just one thing more. I have been on my feet longer than you gentlemen would like to listen to me. I don't think in view of the turn the case has taken that this makes any difference, but Mr. Clark is apparently of the opinion that during the tax years in question the Jersey Company could not have been liquidated tax free.

I do not know. I am not much of a tax lawyer, although I try these tax cases, but I am just surrounded by tax experts here who tell me that there never was a time from the beginning of our tax laws, or since 1918 at least, when a company that succeeded in owning 80 per cent of a subsidiary could not by one means or another eliminate that company, close up shop, and do it tax free, and I believe those men are right. I take their word for it, and Your Honors would know more quickly than I would, and I have one thing further to say.

The cross examination of Mr. Merriman opened with my showing him a proposed tax by New Jersey on the Jersey Company, of a cool million and a half dollars a year, a property tax just for the pleasure of sitting in New Jersey and doing business, and I first tackled Mr. Merriman on that, with that, on cross examination, and as we stood there at that moment, here was New Jersey, ready then to slap on a tax of a million and a half dollars for a single year for the privilege of doing business in New Jersey, and I would say to Mr. Prince and his company if he were in that court room now, "I don't care whether it costs money to get rid of the Jersey Company or not, $3,000,000 says Mr. Clark, it is only two years of Jersey taxes," I would have gotten rid of it whether it was tax free or not, but I do say that I understand and believe the Jersey Company could have been eliminated at any time since 1918, if the Maine Company owned 80 per cent of its voting stock, and that would be tax free.

Member Opper: Mr. Welch, just one question. I don't want to keep on dragging around dead cats but coming to the question that you raised as to the possible tax result of the transfer in 1918, of that seventeen thousand odd shares of Jersey Company stock by Prince to the Maine Company, and these figures that were given to us as to how the tax results to Prince personally were negligible but if anything it increased his taxes, but how about the tax result to the Maine Company? Would it not get a deduction for the interest it paid, which it did not have before?

Mr. Welch: I believe it is fair to say yes to that.

Member Opper: Thank you.

Mr. Welch: I think that that deduction would have been 12½ percent of the amount.

Member Opper: You mean its tax rate was 12½ percent at that time?

Mr. Welch: Yes, but Mr. Green points out that it did not make very much difference because the Maine Company had nothing but dividend income anyway, which was untaxable, if Your Honors please, so that I don't think that we get very much gravy out of that 1918 sale anyway.

Member Smith: Now, Mr. Welch, do I understand that if the Board should grant this motion that you have argued this morning, you want another hearing before the Board to present the evidence, and at that time would you be ready to make any argument that you wish to make with respect to all motions that you filed?

Mr. Welch: Indeed; first, I would first offer the evidence and then argue, and clean up all of our house and Mr. Clark is anxious about our trailing on and on and I have promised not to come back again.

Member Smith: I might say, of course, that this case has had a great deal of consideration by the Board, and the opinion that was adopted was the action of the entire Board, and this request that you are making today will have to be acted upon by the Board membership, but we will try to let you know just as soon as we conveniently can as to what the action of the Board will be upon the motion, that is whether it will be granted or denied or whether further proceeding is necessary.

Mr. Welch: And in that connection, may I say that I will at my expense print a transcript of what has happened here, so that it will be convenient for use by any member of the Board?

Member Smith: I think that we will be very glad to get the copy of the transcript of this morning.

(Whereupon, at 3:15 o'clock p.m., hearing of the above matter was concluded.)

[Title omitted.]

MOTION FOR LEAVE TO FILE FURTHER AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION FOR REHEARING AND FOR FURTHER HEARING

[Filed at Hearing July 18, 1940.]

Now comes the petitioner in the above entitled case and moves for leave to file the attached affidavit of James A. McDonough in support of the petitioner's motion for rehearing and for further hearing.

/s/ JOSEPH N. WELCH,
60 State Street,
Boston, Mass.

Granted July 18, 1940

/s/ CHARLES P. SMITH, *Member,*
U. S. Board of Tax Appeals.

[Title omitted.]

FURTHER AFFIDAVIT OF JAMES A. McDONOUGH IN SUPPORT OF PETITIONER'S MOTION FOR REHEARING AND FOR FURTHER HEARING.

[Filed at Hearing July 18, 1940.]

James A. McDonough, being first duly sworn, deposes and says as follows:

In an affidavit made by me on April 12, 1940, attached to the petitioner's motion for rehearing and further hearing in this case, I stated that as of April 12, 1940, the Maine Company had acquired and owned 64,656 shares of Jersey

common and 31,563 shares of Jersey preferred and more stock was steadily being purchased.

As of July 10, 1940, the date on which the charter of the Jersey Company expired, the Maine Company had acquired and owned 64,718 shares of Jersey common and 50,879 shares of Jersey preferred. The cost of said Jersey preferred to the Maine Company was in excess of $5,000,000.

On July 10, 1940, the following plan for complete liquidation of The Chicago Junction Railways and Union Stock Yards Company (the Jersey Company) was adopted by the Maine Company at a meeting of the directors of that company:

> THIS AGREEMENT dated July 10, 1940 between CHICAGO STOCK YARDS COMPANY, a Maine corporation (hereinafter called the "Maine Company"), as party of the first part, and THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, a New Jersey corporation (hereinafter called the "Jersey Company"), as party of the second part, WITNESSETH THAT:
>
> The Maine Company is the owner of stock of the Jersey Company possessing more than 80% of the total combined voting power of all classes of stock of the Jersey Company entitled to vote, and is the owner of more than 80% of the total number of shares of all classes of stock of the Jersey Company.
>
> The Jersey Company, by operation of law, ceases on July 10, 1940 to be a going concern and to be a corporation except for the limited purpose of winding up its affairs, paying its debts and distributing any remaining balance of its assets among its stockholders.
>
> The parties hereto desire to effect the complete liquidation of the Jersey Company not later than December 31, 1940.

THEREFORE, in consideration of the premises, the parties hereto adopt the Plan for Complete Liquidation of the Jersey Company herein set forth and agree, each with the other, that in accordance therewith the Jersey Company shall be completely liquidated as follows:

1.—The Jersey Company, during the period beginning July 10, 1940 and ending December 15, 1940, will pay (a) all of its indebtedness whenever incurred which is due and payable on or before December 15, 1940 and (b) all amounts payable in liquidation to the holders of its outstanding preferred stock.

2.—All payments described in paragraph 1 shall be made in cash except that the Jersey Company may pay all debts due the Maine Company in shares of stock of The Union Stock Yard and Transit Company of Chicago (herein called the "Transit Company") at their fair value at the date of payment. Payments in liquidation of Jersey Company preferred stock shall be made as soon as possible after July 10, 1940 except that payment to the Maine Company in liquidation of its holdings of Jersey preferred stock may be delayed until the completion of the transactions described in paragraphs 1 and 4 of this Plan. All payments in liquidation of preferred stock of the Jersey Company shall be in complete cancellation and redemption of such preferred stock.

3.—The Maine Company, at the request of the Jersey Company, will loan the Jersey Company cash in such amounts as, when added to Jersey Company cash available for the purpose, will enable the Jersey Company to make the cash payments described in paragraph 2 of this Plan. For all sums so loaned, the Jersey Company will give collateral notes due December

15, 1940, and secured by 132,000 shares of stock of the Transit Company and 55,000 shares of stock of Chicago Junction Railway Company (herein called the "Railway Company"). Such collateral notes may be paid in stock of the Transit Company at their fair value at the date of payment.

4.—The Maine Company, not later than December 15, 1940, will assume and pay when due all obligations at any time accruing of the Jersey Company not paid by the Jersey Company as provided in paragraph 1, including (but without limitation) all liability of the Jersey Company with respect to Federal and state taxes at any time accruing and as guarantor of the principal and interest of $2,327,000 principal amount of the 4% bonds of Chicago Junction Railroad Company due March 1, 1945; and thereupon the Jersey Company, in consideration therefor, will transfer and assign to the Maine Company (a) shares of stock of the Transit Company having a fair value at the time of transfer of $2,000,000 and (b) all assets of the Jersey Company except the following

(1) Assets used in making the payments described in paragraphs 1 and 4 of the Plan;

(2) Shares of stock of the Transit Company not used in making the payments described in 1 and 4 of the Plan; and

(3) Shares of stock of the Railway Company.

5.—The Jersey Company, upon completion of the transactions outlined in paragraphs 1 and 4 of this Plan, will distribute its remaining assets in final liquidation among the common stockholders of the Jersey Company in complete cancellation and redemption of the common stock of the Jersey Company. All distribu-

tions under this paragraph 5 shall be made pro rata and in kind: Provided that no fractional shares of Transit Company or of Railway Company will be distributed and that whenever any Jersey Company common stockholder becomes entitled in distribution to a fraction of a share of Transit Company or Railway Company, the Maine Company will, at the option of such Jersey common stockholder, (a) either purchase such fractional share on the basis of the fair value at the time of distribution of a whole share of like kind or (b) sell to such common stockholder on the same basis that part of a share which, when added to the fraction of the share to which such stockholder is entitled, will equal a whole share.

6.—The Maine Company, at its option, may repledge as security for loans now or hereafter made to the Maine Company all or any part of the shares of stock of the Transit Company and of the Railway Company received by it as security for loans at any time made by it to the Jersey Company; PROVIDED, that the aggregate amount of loans to the Maine Company for which such shares are repledged shall not exceed the aggregate amounts loaned by the Maine Company to the Jersey Company; and PROVIDED, FURTHER, that the number of such shares so repledged shall not exceed that fractional part of all outstanding stock of the Transit Company and the Railway Company respectively that equals the fractional part of the outstanding common stock of the Jersey Company at the time owned by the Maine Company.

7.—The parties hereto, by mutual consent, may modify the Plan in any manner not inconsistent with its general purpose.

8.—This Agreement and Plan is executed in two

counterparts, each of which is an original and both of which constitute but a single instrument.

IN WITNESS WHEREOF, Chicago Stock Yards and The Chicago Junction Railways and Union Stock Yards Company have caused their respective corporate seals to be hereto affixed and this Agreement and Plan to be executed by their respective officers thereunto duly authorized, as of the day and year first above written.

On July 11, 1940, said plan was adopted by the Jersey Company and its liquidating trustees at a meeting of the directors and liquidating trustees of that corporation.

On July 11, 1940, the above set forth agreement constituting said plan was executed and delivered by the Maine Company and the Jersey Company.

On July 11, 1940, as provided in paragraph 2 of that plan payments in liquidation of Jersey Company preferred stock were made in cash to all holders of such stock except the Maine Company. In order to enable the Jersey Company to make such payment, the Maine Company loaned to it the sum of $500,000.

JAMES A. McDONOUGH.

THE COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. JULY 15, 1940.

Subscribed and sworn to before me this 15th day of July, 1940.

JOSEPHINE A. KRAFT,
Notary Public.

[SEAL.]

My commission expires March 24, 1945.

[Title omitted.]

ORDER.

[Dated September 21, 1940.]

On April 18, 1940, the petitioner filed a "Motion for Rehearing and Further Hearing" on the ground of newly discovered evidence. Hearing thereon was heard by a special Division of the Board consisting of three members on July 18, 1940. At such hearing it appeared that the purpose of the filing of the motion was to introduce into the record evidence that after the original hearing measures had been actually taken to liquidate the New Jersey Company, upon the expiration of its charter on July 10, 1940. The Board being of the opinion that the evidence sought to be introduced is not newly discovered and is immaterial to any issue in this proceeding, for reasons stated in a Memorandum Sur-Order attached hereto, it is ordered that the motion be and the same is hereby denied.

It is further ordered that the petitioner's motions "to Modify Findings of Fact and for Additional Findings of Fact," and "for Further Hearing," filed April 18, 1940, be set for argument before a Division of the Board on October 1, 1940, at 10:00 a. m., in Hearing Room No. 2.

Reviewed by the Board.

STERNHAGEN, VAN FOSSAN and LEECH dissent.

(signed) CHARLES P. SMITH,
Member.

[SEAL]

UNITED STATES BOARD OF TAX APPEALS

Docket No. 83797.

CHICAGO STOCK YARDS COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

JOSEPH N. WELCH, ESQ., EDWARD J. KEELAN, JR., ESQ., LAWRENCE E. GREEN, ESQ., JOSEPH K. MOYER, ESQ., and FRANCIS B. KEENEY, ESQ., *for the petitioner.*

PHILIP M. CLARK, ESQ., and STANLEY B. PIERSON, ESQ., *for the respondent.*

MEMORANDUM SUR ORDER.

SMITH: Counsel for the petitioner, on April 18, 1940, filed three motions in the above-entitled proceeding promulgated March 20, 1940, 41 B. T. A. 590. One was headed "Motion to Modify Findings of Fact and for Additional Findings of Fact"; a second one, "Motion for Rehearing and Further Hearing"; and a third, "Motion for Further Hearing." The three motions were set for argument on July 18, 1940, and a Division of the Board, consisting of members Kern, Opper, and Smith, was appointed by the Chairman to hear the argument.

At such hearing counsel for the petitioner chose to argue only the second motion, referred to above, for the opening of the proceeding to receive evidence that the charter of the New Jersey Co., which expired on July 10, 1940, was not renewed and that steps were actually being taken to liquidate the company.

The motion was opposed by Government counsel upon the ground that the evidence was not *newly discovered evidence* since it related to events which occurred after the

hearing and for the most part after March 20, 1940, the date of promulgation of the Board's opinion, and that the evidence sought to be introduced was immaterial to any issue raised by the petition.

In our opinion in that case we said, 41 B. T. A., page 623

> Although Prince testified that under his program it was contemplated that the Jersey Co. would be liquidated in 1940, there appears to be no necessity for its litigation and many reasons why it probably will not be liquidated. When the petitioner was organized in 1911, an issue of $14,000,000 bonds was provided for. The petitioner covenanted with the trustee that it would do all that was necessary for it to do to continue the existence of the Jersey Co. The outstanding bonds of the petitioner are callable at 105, but if they are not called and paid off the petitioner is under obligation to continue the existence of the Jersey Co.

The above paragraph of our opinion is the basis for the motion for a further hearing of the case on the ground of "newly discovered evidence." The above-mentioned paragraph forms no part of the predicate for the conclusion that the petitioner is liable to tax under section 104 of the Revenue Acts of 1928 and 1932 for the years 1930, 1932, and 1933.

There is evidence in the record that Prince contemplated the possibility prior to 1920 of the dissolution of the New Jersey Co. upon the expiration of its charter on July 10, 1940. There is also evidence that he acted consistently with this possibility. The record also shows that the petitioner had bonds outstanding which mature in 1961 and that it had contracted to continue the existence of the New Jersey Co. until those bonds were all paid off, and that some time prior to the date of hearing Prince, or somebody for him, had obtained the opinion of counsel as to whether the charter of the New Jersey Co. could be extended provided such extension seemed desirable.

Dissolution of the New Jersey Co. was a contemplated possibility, which is recognized in the opinion, and purchase of that company's securities might facilitate such dissolution if it eventuated. But we made no finding of fact on these points because in our view that was the most that could be said and that could not be of any significance in reaching our ultimate conclusion. The proposed evidence adds nothing to the previous record in this respect. Dissolution was a possibility, and it is asserted that it has happened. It was not inevitable. Even as to prior intention, the proposed evidence is no persuasive guide. A man might easily do the unintended; and perhaps more so if he thought to benefit a case already heard and in process of decision.

The question arises as to the advisability of the Board granting a rehearing in a case to show facts which became facts after the original hearing and after the Board had promulgated its opinion. Such action seems even less desirable since such facts are the result of action by petitioner, the interested party, and are thus similar to self-serving declarations made long after the event, which the interested party now asks us to treat as sufficient to counteract our previous conclusions.

Although the motion is for the introduction of "newly discovered evidence" it is quite apparent that the evidence sought to be introduced is not newly discovered. It relates entirely to facts which could not have been introduced in evidence at the date of the hearing. The Board being of the opinion that the so-called newly discovered evidence is incompetent and immaterial to any issue before the Board, the motion is denied.

Reviewed by the Board.

STERNHAGEN, VAN FOSSAN and LEECH dissent.

Entered Sept. 21, 1940.

[Title omitted.]

REPORTER'S MINUTES.

[Filed October 15, 1940.]

Hearing in Hearing Room No. 2, Internal Revenue Building, Washington, D. C., on the 1st day of October, 1940, at 10 o'clock a. m.

The above-entitled matter came on for hearing on this the 1st day of October, 1940, before a Division of the Board comprising the following Members:

Honorable Charles P. Smith
Honorable John W. Kern
Honorable Clarence V. Opper

pursuant to notice of hearing heretofore given; whereupon the following proceedings were had and argument heard, to wit:

Appearances:

Joseph N. Welch, Esq., Edward J. Keelan, Esq., and Lawrence E. Green, Esq., (Hale & Dorr, 60 State Street, Boston, Mass.)

Joseph K. Moyer, Esq. (1343 H Street, N.W., Washington, D. C.) and

Francis B. Keeney, Esq. (Swan, Keeney & Smith, 1310 Turks Head Building, Providence, R. I.)

on behalf of Petitioner.

Philip M. Clark, Esq. and Stanley B. Pierson, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue),

on behalf of the Commissioner of Internal Revenue, Respondent.

PROCEEDINGS.

The Clerk: Docket No. 83797, Chicago Stock Yards Company.

For the petitioner, Mr. Joseph N. Welch, Mr. Lawrence E. Green, of 60 State Street, Boston, and Mr. Joseph K. Moyer, of 1343 H Street, NW, Washington, D. C.

For the respondent, Mr. Philip M. Clark, and Mr. Stanley B. Pierson.

Member Smith: Proceed.

Mr. Welch: And for the petitioner, Mr. Francis B. Keeney, of Providence, Rhode Island.

The Clerk: That is right.

STATEMENT ON BEHALF OF THE PETITIONER.

Mr. Welch: May it please Your Honors, first, a pure formality in connection with the denial by the Board of the motion to be allowed to introduce further evidence.

I have prepared an offer of proof, and wish to file it. I shall make no reference to it other than to make it a part of the record, so that it may, if need be, be taken to the Circuit Court of Appeals.

Member Smith: It may be received.

Mr. Welch: I now proceed, if Your Honors please, to the "Motion to Modify Findings of Fact and For Additional Findings of Fact," and if agreeable to the Board, I will take up seriatim the requests for changes, additions and modifications.

In so doing, it will be necessary to cover the case as a whole, and the consequence is, as I argue that motion, I say to Your Honors all that I have to say this morning.

When we met last time, some question was raised as to the probable time I would take. I am almost totally unable to make a statement, I guessed so badly the other day.

But I would be happy and comfortable if there would be an indication from the Bench. My guess is that I would be likely to run through the morning and perhaps even into the afternoon.

Member Smith: I rather expected that. I think there will be no question as to the time.

Mr. Welch: Thank you, sir.

I then turn to the motion which is headed "Motion to Modify Findings of Fact and For Additional Findings of Fact," and I am assuming each Member has a copy before him.

Member Smith: That is correct.

Mr. Welch: The first additional finding of fact is a purely formal one. It is that you simply find as a fact that everything contained in the stipulation is true. It is a pure formality. I am perhaps over-tender about it, but I would be obliged if that finding could be made, so that there never could be any discussion as to whether those facts stipulated are facts.

Member Smith: Is there any objection to that finding?

Mr. Clark: I can't think of any, Your Honors.

Mr. Welch: What I have said about No. 1 will apply equally to No. 2. Am I correct in thinking that, Mr. Clark?

Mr. Clark: Just a moment, please.

In that regard, Your Honors, that is relative to the deduction of $221,000 odd. I think in that connection the Board's opinion on page 1, stating that

> "All issues have been settled by stipulation except one arising from respondent's determination that petitioner is subject to tax under Section 104 of the Revenue Acts of 1928 and 1932."

covers that. And in the computation filed by the respondent on April 5, 1940, this deduction has been allowed to the

petitioner. I don't see why that should be found as a fact, specifically.

Mr. Welch: Certainly it could do no harm. It is agreed between us that it is a fact which should be found, and perhaps I am over-tender in wanting to be sure that the record is entirely clear.

Mr. Clark: It is certainly true that you are entitled to this deduction, and it has been so recognized in the computation, and the Board has recognized there is no other issue except as stated, and it would seem to me it would be surplusage to put it in again.

Member Opper: Supposing that were a disputed question, could that be a finding of fact? Isn't that really a statement of the ultimate legal conclusion which, if this were not an agreed result, you would be litigating, and you would be litigating it partly as a matter of law?

Mr. Welch: Well, it seems to me we are having a difficulty about something that actually presents no difficulty.

Member Opper: I agree, but since you are asking to have a finding of fact made which is rather a question of bringing to the attention of the Board, if it were unaware of it, that the parties have agreed to a certain result, that is that they have withdrawn from the consideration of the Board a certain issue.

Mr. Welch: I suppose what impelled me to ask this is that on page 33 of the opinion, the Board did find as a fact a similar situation; and I think, to be consistent, this matter should be found. I don't think it is useful to take either time or energy to discuss it, and nobody is going to feel badly, however it comes out.

But I might put it this way, that I would feel somewhat happier if the Board did make the finding.

Member Smith: Well, it is true anyway, except as to

the number of shares. That "305", I take it, should be 3,050.

Mr. Welch: That is correct, Your Honor.

Member Smith: Then we will pass that and go to the third one.

Mr. Welch: I then pass on to No. 3.

What I have suggested there is again something that is not extremely exciting to me, but the testimony was clear to that effect, and the statement that I have suggested is a finding of fact which is, I am confident, entirely accurate. And, once more, I should think it unlikely that Mr. Clark would oppose that finding.

Mr. Clark: Well, of course, I do oppose it, Your Honor. The finding requested is not justified. The investment in Pau Corporation does not appear on the books of the Maine Company, in the first place. No consolidated returns were filed by the Maine Company, including the business transactions of Pau Corporation, and there isn't any evidence introduced that F. H. Prince and Company, or Prince, himself, rendered an accounting to the Maine Company. I see no basis for petitioner's request.

Mr. Welch: Once again I have more important things to say to Your Honors than to argue about this. If you will look at the reasons suggested in the motion for the finding, I am content—and if you will look at the record, I think it is fair of me to ask that the finding be made, and I do so request.

Mr. Clark: There was a self-serving declaration to that effect.

Mr. Welch: Much evidence, Mr. Clark, in law suits, is self serving. That cannot be otherwise. That is no criticism of the evidence or no statement that the evidence does not appear in the record.

No. 4 is again something that is perfectly clear from the

record. It has to do with this write-up. It seems to me fair in a case of this sort that a write-up of so large a sum should be reflected in the findings by the Board. I say that for the reason you cannot pay liabilities with book assets. You can only pay them with realities. And if and when this case reaches the Circuit Court of Appeals, I think a somewhat fairer picture of the petitioner's situation is exhibited to that Court if this finding is made. And it is for that reason, therefore, that I do request this.

Mr. Clark: Your Honor, I am going to ask Mr. Pierson if he will speak to the Board relative to this point because I think he is better equipped than I in that regard.

Mr. Pierson: In that connection, if Your Honors please, the finding of the fact of the Board in this regard already discloses that the figures contained therein in Paragraph 22-B are taken from the consolidated return for 1929, which was filed by the Jersey Company, that is, as the statement of facts now stands.

The write-up amounting to more than thirteen million dollars, which is referred to in this request, is only one of a series of agreed adjustments, the net result of which as reflecting the excess of assets over liabilities of the consolidated group, does not equal the thirteen million dollars, as requested by the petitioner.

And in that connection, there were agreements entered into between the parties, and the stipulation, which was made the subject of a compilation as contained in Respondent's Exhibit D. And this request standing alone for the adjustment or showing of the thirteen million dollars should not be made unless all of the adjustments that were agreed to by the parties are agreed to in the findings of fact.

Mr. Welch: I think the answer to the suggestion is that we ought to accede to that portion of the new findings, so to speak, suggested by Mr. Pierson, and we do so.

Mr. Pierson: And, further, in that connection, that respondent's experts testified to the fact that the assets of the Jersey Company and its subsidiaries had a fair market value which was greatly in excess of that reflected by the books and or the returns as adjusted. And that, likewise, should be reflected in any adjustments regarding the excess of assets over liabilities.

Mr. Welch: Now, the suggestion in respect to Paragraph 5, of the motion, has, I think, been covered by what both of us have said in respect to No. 4.

Mr. Pierson: That is true, Your Honor. That is merely a carry-through to the later years.

Mr. Welch: The next is a request that the Board add to its finding No. 22 the new paragraph that is set out in the motion.

Could I inquire at this point whether or not the copies of the motions that the Board are working from have a flyer pasted on to the top of page 5?

Member Smith: That is correct.

Member Kern: And at the bottom of page 4.

Mr. Welch: And the same at the bottom of page 4.

Member Smith: Is it not true, Mr. Welch, that the liabilities are in the amount of $27,528,781.93, instead of $29,528,781.93, and that the excess of assets is $38,000,000 instead of $36,000,000? That was checked out by me, I think, and found to be the fact.

Mr. Welch: If so, that is quite all right. It so happens that the preparation of this particular section of the motion was done in Washington, with some data we wanted being in Boston, and unavailable to us; and Mr. Green and I are not happy with the original mistakes. I am content with the suggestion Your Honor makes. I have no doubt it is correct.

Member Smith: Is there any objection to that finding?

Mr. Clark: No. Well, now, I didn't understand Your Honor. Perhaps I thought it was relative to the change in the figures.

Member Smith: No I meant the entire finding.

Mr. Clark: No. Mr. Pierson will handle that, too.

Mr. Pierson: In this connection, if your Honor please, it seems to the respondent that the financial structure of the Jersey Company and its subsidiaries is really immaterial to the question here before the Board.

I might point out that the Maine Company throughout the years 1930 to 1933 held an interest of approximately 33 1/3 percent in the book value of the assets of said companies. But as our position has always been throughout here, the business of said companies was not the business of the Maine Company. And as pointed out in the Board's decision on page 32 (41 B.T.A. 620), after noting the financial structure of the Jersey Company and its subsidiaries at December 31, 1929, it cites the case of the Keck Investment Company in support of the position. It would seem that the situation as of December 31, 1933, is not material to our issue here.

Member Kern: You have no question as to the accuracy of the figures? Your position is that the whole finding is immaterial?

Mr. Pierson: In that connection, I might state that should the Board decide this data with respect to December 31, 1933, be included in the statement of facts, then the data regarding the thirteen million dollar adjustment should likewise be carried through to reflect in these figures contained in the request, that is, carry that write-up and adjustments as requested in Respondent's Exhibit D and likewise carry on through to December 31, 1933.

Mr. Welch: I am content that they should.

Mr. Pierson: With respect to the last paragraph contained in No. 6, I would like to state that the Maine Com-

pany here seeks to have the Board find that the enterprise needed at least $5,000,000 cash as working capital. It is noted from the record that in the year 1933 the Jersey Company paid out in cash dividends more than two million dollars and at the close of the year the Jersey Company and subsidiaries had less than $1,361,000 in cash. And it would therefore seem to respondent that if the Jersey Company and its subsidiaries needed $5,000,000 in cash, it would have to withhold the entire dividend distribution in 1933.

So I really don't believe that that last paragraph is warranted.

Mr. Welch: In that connection, Your Honors, you will hear me saying a great deal more, before the morning is over, about that huge dividend declaration when there were not, in fact, any earnings in the Transit Company.

The answer to the need for the $5,000,000 in working capital was that it was the view of Mr. Prince, the man who ran the Maine Company, that the Maine Company was the banker, and the money could be advanced to the subsidiary companies. The evidence from all quarters was that at least $5,000,000 working capital in the enterprise somewhere was necessary, and that is all we seek to have found.

I now pass to No. 7. No. 7 has to do with the transactions in coming to the rescue of the Chicago banks. The testimony was clear that it was known at the time that a huge portion of the roughly ten million dollars would be lost, and it is, I think, fair to the petitioner's case that that should be found as a fact.

Mr. Clark: Well, I think, Your Honors, in that regard there isn't any evidence showing us what portion, if any, of this loss would be borne by the Maine Company. And the losses that actually occurred and were substantiated have

been recognized by the Board in its finding in Paragraph 23, I think.

There isn't any showing of the net amount that would be lost after December 31, 1933.

In Paragraph 23, of the findings, the first full paragraph at the top of page 11 (41 B.T.A. 600), there is a recital relative to this. I don't think that it is necessary to read it, unless Your Honors care to have it read into the record.

Well, in fact, I think all the Paragraph 23 material applies, but especially what I referred to as the first full paragraph at the top of page 11 (41 B.T.A. 600).

Member Kern: I take it, then, you object to the adding of this as a finding?

Mr. Clark: Yes, sir; I do. It seems to me immaterial.

Member Kern: Immaterial, but not inaccurate.

Mr. Clark: Well, it goes to a question of anticipation, Your Honor. I don't quite see why anticipation at this time plays a part. The accuracy of the figures is spelled out by the Board in its findings, under Paragraph 23.

Member Opper: Wouldn't the anticipation of the future liability have some effect on the reason for the accumulation?

Mr. Clark: Well, it might, Your Honor. I am not quarreling too much with that.

Member Smith: Let us pass to No. 8.

Mr. Welch: No. 8 is, of course, very simple.

Member Smith: And may I ask if there is any objection to that No. 8 finding?

Mr. Clark: Just a moment, Your Honor, until I locate it.

Member Smith: The figures are unquestionably correct and I omitted to put them all in, for all of the years, because I didn't think they were necessary.

Mr. Clark: Mr. Pierson may have some comment on that. I think we have no particular objection.

Mr. Pierson: I believe, as Your Honor states, the figures contained therein are correct, but in that connection, whatever reduction of indebtedness there was prior to 1922—that is, Your Honor's findings start with the year 1922—has been found by the Board in Paragraphs Nos. 14 and 15 with regard to the transactions entered into between the petitioner and the Maine Company and the Armour Company, all of which tended to reduce the indebtedness in the early years prior to 1922. But there is no question as to the figures contained therein, but what they are correct.

Member Opper: Mr. Welch, I unfortunately have here a copy of the opinion which is published in the other edition, and I wonder whether you would read to me the first few words of that sentence beginning at the bottom of page 11 (41 B.T.A. 600)—Which paragraph is it?

Mr. Green: In the paragraph beginning at the bottom of page 600 and continuing at the top of page 601 of your version.

Mr. Welch: Would Your Honor permit me to look at your copy to see just what we have to deal with?

(Discussion at the bench off record.)

May I say this for the record, that Mr. Green and I have appreciated the fact that there might be some difficulty about the paging, and we are prepared to make the record sensible to Your Honors in some way. It occurs to me, however, that when this record of today is printed, we may take the liberty of inserting a different system of paging so that other Members of the Board will not have any difficulty in following what we do say here.

Member Opper: I do think, for example, in foreseeing the effect on the Circuit Court of Appeals, it will be simple for them to refer to the paging in the volume, because the probability is that they won't have the other copy.

Mr. Welch: And when the record is printed, I will do

such editing as is necessary to make it sensible for them.

I would like at this point to inquire, is it going to be a fact that each Member here sitting is going to work from the copy identical with that which Member Opper is using, or is anybody using the little pamphlet which came down, which I happen to be using?

Member Kern: I think I will be using the same type Mr. Opper is.

Member Smith: It doesn't make any difference. I have both of them here.

Member Opper: Well, I am sorry to interrupt.

Mr. Welch: I appreciate it, because this is a difficulty with which I knew we were faced, and I wanted to make the record sensible.

No. 9 has to do with finding of fact No. 24. There isn't much that I wish to say prior to having heard from the other side on this. The suggested changes that I make, it seems to me, are entirely in line with the uncontradicted evidence. I am particularly allergic to the statement that the loans were used by Prince for any purpose desired by him. I can't quite believe that the majority thoughtfully meant to say that about the loans. They were all made for perfectly definite purposes, and only that trivial $160,000 loan was made for any purpose desired by him, meaning Mr. Prince. This suggested change was prepared by counsel, prayerfully and thoughtfully. And we do think it presents a somewhat fairer picture of the loans to anyone who may hereafter look at this record, and we respectfully request that this be said in the findings of fact.

Member Smith: Mr. Clark?

Mr. Clark: Well, I think, Your Honor, that what petitioner's counsel asks the Board to do is to adopt practically the statement of findings as made by the Member who wrote the dissenting opinion. I think the Board has found relative

to this, and there is ample evidence in support of it, as appears in Paragraph 24 at page 12 (41 B.T.A. 601) of the opinion. I don't want to go into it in detail. Your Honors have considered all this before.

There is one further thing I would like to mention, Your Honor, and that is that it appears in the record that Maine Company charged interest on the loans to Prince, and that Prince paid interest on those loans and deducted it in his income tax returns, which, it seems to me, has a definite bearing. And he didn't make any accounting to the Maine Company for it, for those transactions.

That is all I have to say.

Mr. Welch: No. 10, of course, on its face, has to do with finding No. 34. The reasons that we request the finding must, I think, be obvious. The evidence was undisputed and clear, and I think there is really nothing I can add to the reasons that were suggested in the motion as to why the finding should be made.

Mr. Clark: I don't see that it is material, Your Honor. I don't see any materiality to it as to what happened after the sale by Prince to the Maine Company, wherein he had benefits by the deduction of losses in his income tax returns without parting with the beneficial interest. It seems to me wholly irrelevant. That is the only comment I would have to make.

Mr. Welch: I would go along with Mr. Clark if he would say the whole subject is irrelevant, as I think it is, under Your Honors' decisions. I am content if you would leave the whole thing out and not say anything, but if you do say some things, I only beg of you to be fair to me in regard to the fact that the transaction did not hurt the program of the Maine Company, but, in the last analysis, favored the program.

Mr. Clark: My objection to materiality, Your Honors,

comes only relative to what transpired after the sale by Prince to the Maine Company.

Member Smith: You are not questioning the accuracy of the proposed finding, Mr. Clark?

Mr. Clark: No, sir.

Member Smith: We will hear the next one.

Mr. Welch: The next one is a suggested rephrasing of the finding of the majority in regard to how the bank crisis situation was handled in Chicago. I am going in another section of my argument to handle or to deal more pointedly, and I trust more powerfully, with the suggestion that whatever happened in Chicago was the act of the Maine Company.

I would like it if Your Honors would, when I refer or when I reach that point in my argument, by reference, so to speak, apply it back here. But I will say at this point that the suggested finding seems to be entirely in accord with the record, and that the reasons there suggested are cogent and sufficient to support the request.

Mr. Pierson: In that connection, it seems to respondent that the substitution of this material in lieu of that already contained is not warranted for the reason that the only evidence in support of this request is a self-serving declaration made by Mr. Prince and his subordinates.

In that connection, respondent introduced into evidence documentary evidence in the form of returns which show business salaries and everything paid to the respective officers of the different corporations. And had the Maine Company handled the stockyards banking situation and the stated activities of the Jersey Company and its subsidiaries involved, including, as they did, traveling expenses and telephone calls and personal services and disbursements and charges for such service, and had they been made with the Maine Company, they would have ap-

peared as claimed deductions from that company's gross income. All this was argued by respondent at the time the brief was filed. The return of the petitioner in this case reflects nothing of that sort of deduction, and the Board has found as a fact in Paragraph 29 that the expenditures made by petitioner in the years 1930 to 1933, inclusive, that they are already set forth in the Board's findings of fact.

And, furthermore, Mr. Prince was paid salaries by the stockyards group as set forth in the Board's findings in Paragraph 35, in amounts of approximately $48,000 annually.

The consolidated income tax returns of the Jersey Company and its subsidiaries further disclose that Prince was devoting the majority of his time to these companies, to the apparent exclusion of any services rendered to petitioner. And the consolidated returns of the Jersey Company and its subsidiaries further disclose that very large salaries were paid to the officers and directors of those companies for the management of those companies.

And it seems to me that it is unwarranted to include these conclusions in the findings which, as I see it, are contrary to the evidence in the record.

Mr. Welch: I would just like to say one word in response to that. The Commissioner of Internal Revenue allowed as a deduction on the Maine return a salary of $50,000 a year to Mr. Prince for what he did as an officer of that concern. It seems to me totally impossible for any one to stand in this court room and say that that very substantial reduction could have been allowed on that return unless the Commissioner well knew that Mr. Prince's activities in the Maine Company were sufficient to support a salary of that size. It happens to be that his salary in the Maine Company was greater than the sum of all his other salaries. And, as I have said to Your Honors a moment ago, when

I reach another section of my argument, I hope I shall be able to demonstrate on the argument, on the whole question, that the activities of the Maine Company in Chicago, not only in the banking situation, but everything else were serious and important and large in volume.

I assume that we should proceed to No. 12?

Member Smith: That is correct.

Mr. Welch: No. 12, once more, is a suggested change in a finding entirely in conformity with the testimony and it seems to me somewhat fairer to the petitioner than the finding that is now made. Because of the fact that it does conform to the testimony and because it seems to me fairer, I respectfully request that the substituted finding be made.

Mr. Pierson: In that connection, Your Honors, I think the argument that has been advanced with regard to issue No. 11 applies with equal force to No. 12.

Mr. Welch: On both 11 and 12 I think I want only to say that I would appreciate if Your Honors would look carefully at the record and at the motion and at the reasons for it, and I hope that you will reach the conclusion that what I suggest is fair. If you don't, I shall not die of despair. I don't think it is extremely important, and not so important as what I will deal with later and what I have to say this morning.

And, on the other hand, it is distinctly and sufficiently important so that if, as I have meant to do, I have stated it fairly, I should like to have you grant the request.

No. 13 is quite simple and the reasons for it must be obvious. I think I need not say anything in support of that.

Mr. Clark: It seems to me, Your Honors, this has been discussed and disposed of by the Board in the opinion of September 21st. I haven't anything further to say relative to it.

Mr. Welch: No. 14 was something that was perfectly

clear on the testimony of the experts of both sides, as I pointed out when I was here before, and it seems to me to be an important finding of fact that I should have.

Mr. Clark: That likewise seems to me was dealt with by the Board.

Mr. Welch: No. 15 is a formality. It is, of course, a cornerstone of the petitioner's case, and since it is a cornerstone and so obviously true, I would appreciate it if it were made as a finding of fact.

Member Smith: If that finding of fact is made, of course the conclusion reached by the Board is not correct?

Mr. Welch: Not formed for the purpose.

Mr. Pierson: In that connection, if Your Honors please, I think the Board has treated with that true not in its findings of fact, but at page 25 (41 B.T.A. 613) of the opinion it is stated:

> "The petitioner was formed in 1911. It clearly was not formed for the purpose of preventing the imposition of the surtax"—

and that has been already treated by Your Honors.

Mr. Welch: The answer to that is that we consider it so fundamental we will be happy to have it made as a finding of fact.

Mr. Clark: There has never been any question about it, if your Honors feel it should be found.

Mr. Welch: Nos. 16 and 17 I wish to treat together. There is substantially nothing I wish to say in respect to them today. The whole ground was covered at the time of the last argument. I would like merely to say that as far as the language is concerned, particularly in No. 17, I

would be equally content if we took the language of the Presiding Member as it appears on page 89 of the record of the last hearing. To remind Your Honors of it, that is where the Presiding Member said:

> "I have no doubt that Prince had the idea—I think it was plain all through this testimony—that it was his idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares to pay off not only all of the bonds of the Jersey Company in or before 1940, but all of the indebtedness of all of the other corporations."

And so I say to your Honors that I want the substance of Nos. 16 and 17, if I may have it, and I will be happy if Your Honors will take my words and not unhappy if you take the words of the Presiding Member.

Mr. Clark: I will leave that to the Board. I have no comment to make.

Mr. Welch: In connection with No. 18, I should like to be allowed to hand to the stenographer a little chalk that has been made from the testimony in the case and ask that it appear in the record at this point—and I will furnish a copy to each of Your Honors—purely to make what I say somewhat clearer, (distributing copies of tabulation in question). This chalk is made from exhibits in the case.

The tabulation referred to is as follows:

SCHEDULE IN CONNECTION WITH REQUESTED ADDITIONAL FINDING OF FACT #18

(1)	(2)	(3)	(4)	(5)	(6)
	Net Earnings of Jersey Co. and Subsidiaries	Dividends to Others than Petitioner	Net Earnings Available for Dividends to Petitioner	Dividends Paid to Petitioner	Excess of Dividends Paid to Petitioner Over Available Earnings of Jersey Co. and its Subsidiaries
1925	$ 2,719,044.66	$ 698,660.49	$ 2,020,384.07	$ 1,919,838.51	$ 100,545.56
1926	2,837,967.33	471,207.00	2,366,784.33	3,151,080.45	784,296.12
1927	2,683,425.88	469,773.73	2,213,652.08	2,048,726.25	(164,825.83)
1928	3,355,540.26	466,926.05	2,988,614.21	2,156,713.13	(831,901.08)
1929	2,526,074.76	460,650.00	2,066,004.56	2,573,429.13	507,424.57
1930	2,302,879.78	461,318.25	1,441,561.53	1,961,309.01	516,747.48
1931	2,660,140.22	450,940.85	2,209,199.37	1,971,080.89	(238,118.48)
1932	2,351,949.67	448,025.25	1,903,924.42	2,424,901.18	521,976.76
1933	2,566,502.48	433,028.75	2,123,473.73	1,978,829.21	(144,644.52)
1934	2,289,144.96	387,872.00	1,872,272.96	1,988,779.35	116,506.37
1935	3,295,282.726	428,987.25	3,206,638.01	1,991,865.19	(1,304,772.82)
1936	(113,182.39)	462,417.00	(538,594.39)	2,948,088.10	2,486,682.39
Total	28,507,617.32	5,438,802.64	23,046,814.88	26,113,642.30	3,066,827.42

Explanation of Sources of Figures and Computations on Schedule.

(2) Source:

For the 1926, Incl. Exhibits 8-3, 8-5, 8-9, 8-12, 8-14, 8-26, 8-34
1926-1930,
1931-1935, " 8-3, 8-5, 8-8, 8-12, 8-26, 8-34, 8-36

Intercompany dividends eliminated.

(3) Source: Exhibit 8-28

(4) Column (2) minus column (3)

(5) Source:

Total dividends paid by Jersey Co. from Exhibit 8-26 minus figures in column (3) of this schedule. The figures in column (5) will not agree perfectly in all years with dividends received by Maine Co. per Exhibit 8-31, because in some years dividends paid by Jersey Co. at end of year were not taken into income of Maine Co. until the next year.

(6) Column (4) minus column (5)

Mr. Clark: Will you pardon me if I interrupt just a moment?

Are you addressing yourself, Mr. Counsel, to No. 18 at the present time?

Mr. Welch: Yes, Paragraph No. 18.

And the chalk that I have handed to Your Honors shows that from 1922 to 1933, one year over a decade, the Maine Company withdrew from this enterprise more than the enterprise produced in earnings. There isn't any dispute about it, but it seems to me an important finding of fact, and Your Honors will quickly see why I think it is important.

So that simple finding of fact No. 18 should, I think, be made, and it is one about which I am rather deeply anxious.

Mr. Clark: I think, Your Honors, that the finding of fact as requested, standing alone, doesn't give a clear picture. The record may support the fact that the Jersey Company and its subsidiaries declared dividends in excess of their earnings for some particular year or years. But it also shows those dividends were received in part by the petitioner and used by it in acquiring common stock of the Jersey Company and in making loans to its sole stockholder and in investing in other assets.

This hasn't any bearing except in a negative way, on the intent of accumulating earnings to avoid the imposition of surtax. And, aside from that, as petitioner has drawn his request for this additional finding, it is to the effect that petitioner withdrew from the Jersey Company and its subsidiaries, which would seem to carry the meaning and inference that the petitioner handled the Jersey Company as I so said, and was in control of it; but that wasn't the case during these years.

So I think petitioner's request is unwarranted and should be denied.

Member Kern: Is your suggestion, Mr. Clark, that it should be denied entirely, or that this finding should be

made plus explanatory findings which you think would state the picture more clearly?

Mr. Clark: Well, I think it should be denied, Your Honor. Of course, if it were so found by the Board, it should in all fairness carry with it the explanatory details which I have stated and which I think are unquestionably borne out by the record. And Mr. Pierson calls to my attention that if this is granted, a similar statement should be made relative to the years from 1911 to 1922, inclusive.

Mr. Welch: I now come to the three most critical motions or segments of this motion, each one of which will take considerable time and argument. And for purely personal reasons I would be pleased if we might have a very short recess before I go into those motions.

Member Smith: Yes, we will take a brief recess.

(Brief recess.)

Mr. Welch: I now address my remarks to Paragraph 19 of the petitioner's motion which is the motion that the Board strike out its finding that the Maine Comapny is a mere holding company and substitute what I suggest is the correct finding, that it was not a mere holding company.

I find myself in this position, if Your Honors please, I have the pleasure of addressing the three Members of the Division and I have the duty, so to speak, to send a message to the other thirteen Members of the Board who are not here. That is, I know they will do me the kindness and courtesy of reading what I say. And because I am addressing some men other than yourselves, for just a moment or two I will, I fear, bore you slightly.

I want to state very briefly a history of the enterprise with which we are here dealing. The enterprise began with a single company, the Transit Company. It was formed in 1865, just after the Civil War, and as a single company it operated the stockyards and it ran the railway and it ran

a light and power plant. Its charter was a legislative charter and limited it in its borrowings to the sum of $500,000;—— and that has never been changed.

That simple, single situation continued along until the Jersey Company appeared. That company appeared in 1890. It was, as we all know, a Jersey company and it was formed under the Jersey Corporation Law of 1875, which had, however, been amended in 1889 to permit a holding company situation. As far as I know, New Jersey was the earliest state which would permit a corporation to be formed to hold the stock of another corporation. And I have always assumed that New Jersey was chosen as the state in which to incorporate what we call the Jersey Company because, as far as I know, it was the earliest state available in which that could be done.

The reason for the formation of the Jersey Company is, I think, well known, certainly, to the three Members on the Bench, and probably to all the Members of the Board. It was formed for this reason. The packers had become jealous of the fact that the Transit Company was making a good deal of money in Chicago. They said to themselves and, indeed, to the Transit Company:

> "You fellows wouldn't amount to anything if it weren't for the presence here of the packing industry. We are really making your money, and we want a portion of it."

And they threatened to move away and they even went over into Indiana and bought a tract of land and pointed proudly to it and said, "This is where we are going to move."

And the Transit Company became frightened and decided it must do something to get the packers to remain in the vicinity of the yards. And what it did was this: It incorporated this Jersey Company to hold the stock of the

Transit Company under an arrangement whereby sums of new capital could be secured, and under an arrangement whereby bonds could be issued, and it secured funds with which it could, and did, placate the packers.

And the packers at that time were given some $4,000,000, as I remember, in bonds of the Jersey Company, and they solemnly signed up an agreement in which they said they would remain at the yards and quit this ugly talk about moving away.

And that, as Mr. Green reminds me, was for a definite period of years, fifteen years.

Now, I have a note of what the Jersey charter provided, and I think it is interesting to look at. It appears in Exhibit S-16, and I am reading only an excerpt.

The Jersey charter stated that the corporate purposes of the Jersey Company, among other things, were to purchase, hold, pledge, transfer, sell or otherwise dispose of, or deal in the shares of the capital stock of the Union Stock yards and Transit Company, and to do any and all acts and things tending to increase the value of the shares of the capital stock of said company.

Now, we have two companies, and we have powerful economic and legal reasons that made two companies necessary. Presently we have a third company; that is the Railway Company.

The Railway Company was split off the Transit Company in 1897. The reason for it is apparent. The Interstate Commerce Commission had by this time come into the field. It regulated railways. And that portion of the Transit Company's business that was devoted to the operation of a railway had come under regulation. It was therefore necessary to set the Railway up separately, so that you had a unit that could be and in fact, of course, was thereafter regulated.

The next thing that happened was the splitting off of the Harness and Saddlery Company, in 1900. That is a trivial event, of course. The Harness and Saddlery Company sold a set of harness to a farmer after he brought his hogs into the stockyards, or sold a saddle to a man who rode his horse about the stockyards. But obviously that funny little retail business didn't make much sense in a large company like the Transit Company, and it seemed sensible to set it up as an individual concern, which was done. It was of little importance and does not now amount to much in this picture.

Then comes what we call the Railroad Company. That is 1902. That is the time when if was found necessary to elevate the tracks of the Steam Railway Company that brought the hogs and the cattle in and took the meat out. And in connection with that elevation of the railway tracks, the steam tracks, it was decided it was an appropriate time in which to build a passenger structure, an elevated structure which would bring workers into the yards and out again,—and that was done.

Obviously that Railroad Company, part of the traction system of a city like Chicago, had to be separately incorporated, because it came under the jurisdiction of the City of Chicago; and the Railroad Company was set up.

Then you reach the District, the Central Manufacturing District. To the north of the stockyards there was almost a square mile of land in 1903 that was vacant. It was land to which the packers occasionally pointed, as they occasionally pointed to Indiana, and said, "We could move up there." It was land on which a competing stockyards might conceivably erect yards, and compete with the Transit Company. Not only that, it was land beautifully susceptible to development. And the Jersey Company and those who ran it conceived the idea that that land should be acquired.

partly for protection but chiefly so that it could be developed and become a feeder of tonnage to the railway and thus greatly strengthen the railway.

It was doubtful at that time if a Jersey corporation, a foreign corporation, could own real estate in Chicago. Probably it was more than doubtful. Probably it was impossible. And so the title to the District was taken in the name of trustees under the Massachusetts type of trust, and the Jersey Company held the beneficial shares of interest.

Then the Produce Terminal was split off in 1916. Again there is a cogent reason for that. The Transit Company by that time had begun to furnish power and light in such quantities that it was, as we all know, a tidy little public utility in Chicago, and the Illinois Commerce Commission looked about and said, "Yes, this is big enough now so that it must be regulated; its rates must be fixed," and things of that sort. And so, since that sort of regulation was impending on that segment of the Transit Company's business, the Produce Terminal was split off and set up separately.

Lastly, before we reach the Maine Company, the Pau Corporation was formed. The Pau Corporation must have seemed a little puzzling to some of the Members of the Board and it was to me until I found out the secret of it.

The Central Manufacturing District also owns not only the land I spoke of but the streets in that whole section north of the stockyards, and there are all kinds of curious easements over those streets—a right to run electric light lines from the Produce Terminal, sewers are in there, put in by the District, and then the streets are paved and there are rights of passage and repassage over them, although they are all actually privately owned—and it was found that as the District made conveyances of land, sometimes somebody would remember to say something about the easements.

and sometimes they wouldn't, and some man who had purchased land thought he had certain easements, and there was a dispute as to whether they had been conveyed or not. And it was decided that the simple thing to do with easements was to put them into this curious corporation called the Pau Corporation and let that company deal with them and pass them out in the event they were passed out to purchasers, so that nothing would get done about an easement that wasn't done thoughtfully and meant to be done. This is really the explanation of the formation of the Pau Corporation. It was to clarify this easement situation, what Transit and District owned and what had gone out to somebody else, and to deal with it intelligently as the conveyances were made from time to time.

I have now mentioned all the companies that appear in this situation, except the Maine Company. The Maine Company, as we all know, was formed in 1911, and I would like to take a moment to tell why that company was formed.

This contract with the packers by which they solemnly agreed to stay in the vicinity of the stockyards, had expired by 1911, or prior thereto. On its expiration, the packers once more began to rattle the sabre and said, "Well, Boys, we are going away again unless we get some more of the gravy of the stockyards," and they frightened the directors of the Jersey Company. They said to the directors of the Jersey Company, in substance:

> "Your common stockholders have been getting 8 per cent for quite a number of years. Because they have gotten used to it and like it, they can still have it. But we are going to take any earnings of the Jersey Company above 8 per cent from now on, or else we are going away."

By this time, Mr. Prince had come to own a little Jersey stock. He had been very much interested in this situation,

and he did not share the fright of his fellow directors on the Jersey Board. And Mr. Prince decided there was a way in which the packers could be kept at Chicago and this sabre rattling stopped, and that way was this. He decided if he formed this Maine Company, and if he gave Mr. Armour, the leading packer, a 20 per cent interest in it, that this talk, which I think Mr. Prince thought, as I have always thought, was slightly bluff, he thought this talk would cease.

So Mr. Prince went to the common stockholders of the Jersey Company and said:

> "Now, these threatening, sabre rattling packers are offering you 8 per cent, and they say you have got to take it or your company is going to disappear. I will tell you what I will do. I will form a corporation and I will put a million cold dollars into it, and I will guarantee you 9 percent, if you will promise me that anything that the Jersey Company earns over 9 percent can go to the Maine Company, and I will take the risks of this sabre rattling and these threats, and I will bet my million dollars on it that the packers don't move away. If they do, I have lost my million dollars, and your stockholders get the guarantee. If they don't, my part of the wager is that if Jersey makes more than 9 per cent from now on, the Maine Company gets that."

Mr. Prince also said one other thing to the Jersey Company stockholders. He said:

> "If you would rather trade your stock in for bonds of this Maine Company in which I am putting this cold million, you may do so, and you may take down two dollars in bonds for each dollar of Jersey stock, and the bonds will be 5 percent bonds and you will get ten

dollars a share on your old Jersey stock, if you will trade your stock for bonds."

The plan appealed to the Jersey stockholders. Large numbers of them traded their stock for bonds of the Maine Company, and such of those who did not make such trade sent in their stock and had it stamped with this guarantee of the Maine Company, by which they received the Maine Company's guarantee that they would in perpetuity receive 9 per cent dividends, and in the same instrument they assigned to the Maine Company all earnings in excess of 9 per cent.

I think Mr. Green is a little allergic to what I say. He says I shouldn't say "in perpetuity." He says I should say "for the corporate life of the Jersey Company," and that, of course, is more accurate, because, as we all know, the Jersey Company charter did expire in 1940.

Now, what is the situation? After the Maine Company is formed, what is the situation? The situation is this:

The Maine Company has had one million dollars put into it, which in 1911, was a huge sum of money. And it was put in, as I say colloquially, on this wager, the wager that the packers would stay and that the Jersey and its subsidiaries would make money and that the Maine Company would get more than 9 percent out of it in the future. If the wager lost, if the packers still moved, in spite of Mr. Armour's having come into the Maine Company, or, quite aside from that, if some other disaster overtook the operating companies in Chicago, so that they had no earnings for a year or two or three years, the situation was such that if the Maine Company were called on for its full guarantee, the million dollars of the Maine Company's capital would have been exhausted in just about two years.

Now, that being true, it was of course intended that the

Maine Company should move in on the Jersey Company, run its affairs, and run the affairs of the subsidiaries.

No company in its senses could, of course, make that wager of a million dollars, which might be wiped out in two years, unless it had full and complete say-so as to what went on in the Jersey Company and the subsidiaries. And so when the Maine Company is formed, you will find Mr. Prince moving in on the Jersey Company, becoming its president, putting in his Board of Directors, and of course you find the Maine Company becoming a large owner of stock in the Jersey Company and directing its destinies thereafter.

When this is done, you have what I think must have seemed to Your Honors a somewhat complicated corporate situation. I have traced with your Honors the history of how you began with one company and ended with all these companies. But I hope I have demonstrated to you that all the way along there was a cogent economic and generally a cogent legal reason, as well, for each change that was made. Nothing was done at anybody's whim. It just had to go this way. But when you get to the end of it, although you have several corporations, you have still just one enterprise. It is still a unit. The Transit Company is what we often call a hotel for hogs. The Railway Company brings the guests in and takes them out dead. That is the Railway, not the Railroad. The Railroad Company brings workers in to work and takes them away.

The Produce Terminal makes light to light up the yard and the packers. The Central Manufacturing District sits off to the north, creating immense tonnages of manufactured goods and raw materials that move in and out on the Railroad. It is all integrated, all a unit; each depends on the other, and the fact that you have several corporations is just an accident that was forced on the enterprise by the history which I have pointed out to you.

What about the Jersey Company, after the Maine Company is formed? It has been superseded. The Maine Company is now the genius, the head, the directing company in the thing. The Jersey Company has become a shell. It is a conduit only for money that flows to the Maine Company, and it doesn't even remain a conduit.

On October 1, 1914—and this is Exhibit S-46—something dramatic happens, as between the Maine Company and the Jersey Company. That is an agreement that is entered into on that date, which we have called the by-pass agreement, and it is an agreement under which the Jersey Company agrees that hereafter all earnings from the operating companies shall by-pass the Jersey Company, shall not even go into its treasury and out again into the Maine Company, but shall flow direct from the operating companies to the Maine Company.

I am going to deal more fully with that agreement at a later point in my argument. I have pointed it out now only for this purpose, to show that by the time 1914 had come around, the Jersey Company, as a going business concern, was completely emasculated and completely dominated by the Maine Company.

This Maine Company that I have now described to you is a company which the majority has said is a holding company and a mere holding company. I wish now to call Your Honors' attention to some definitions of a mere holding company that are in print. The first definition of a mere holding company—and I am not reading to you but I am quoting from memory—as early in the case I looked it up in the dictionary, and the meaning of the word "mere" was given as this: "Nothing else but". The dictionary says that the word "mere" means "nothing else but", from which it follows that a mere holding company must be a company that does nothing else but hold securities.

Well, I am not sure the dictionary is a perfect authority. But some other people besides Webster have defined what a mere holding company is.

I would like at this point to call Your Honors' attention to *Chevrolet Motor Company v. U. S.*, 64 Court of Claims, 211; certiorari denied, 277 U. S. 585. That was a case where the Chevrolet Motor Company sold to General Motors its whole works. It sold its plant, its receivables, every asset that it had, and stood there thereafter as what seemed to be pretty much a shell. But it did do one or two things. It subscribed to some stock of General Motors Company and had something to do with contracts about some financing, and that is all. And when the Commissioner of Internal Revenue said to the Chevrolet Motor Company, "Won't you be good enough to pay a capital stock tax for doing business?" the Chevrolet Motor Company said, "No, thank you. We don't want to pay; we are not doing business, and we are a mere holding company."

But the Court of Claims said otherwise, and I would like to quote one or two sentences from their opinion. Speaking of this company which I have described, they said this: (p. 222)

> "While it discontinued to manufacture motor vehicles, it did not reduce its activities to a mere holding company. It continued a series of business transactions designed and intended to facilitate the successful conduct of the corporation in which it owned a controlling stock interest, and loaned not only its valuable assets to enable the latter to finance vast and important business undertakings but served itself as a conduit or subsidiary for the accomplishment of the purpose, and it is seemingly idle to contend that all this, involving millions of dollars, was done without hope or expectation of profit."

And then dropping down a ways in the opinion: (p. 222)

> "While plaintiff's officers drew no salary and it maintained no expensive organization and had reduced its overhead to the minimum, a fact accounted for in the transfer of the entire organization of the plaintiff to the General Motors Corporation on the date of sale, nevertheless it continued to function in a way that clearly demonstrates that what was done wasn't a mere passive, inert activity looking toward the liquidation of its assets or the usual activities of a holding company, but a lively participation in the activities of two other corporations linked with it, and whose success and profits redounded beneficially to the plaintiff. The plaintiff loaned its corporate powers to other corporations, engaged in and became an important instrumentality in their activities, and participated in their business transactions. Surely this is carrying on business. If not, it is difficult to characterize it."

The next case to which I wish to call Your Honors' attention is *Edwards* (*Collector of Internal Revenue*) *v. Chile Copper Company*, 270 U. S. 452. The situation was a similar one, a company seeking to avoid paying a capital stock tax on the ground it wasn't doing business, and I wish to quote very shortly, from the opinion in that case. Incidentally, the opinion is by Mr. Justice Holmes. (p. 455)

> "The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit. * * * The activities and situation must be judged as a whole. Looking at them as a whole we see that the plaintiff was a good deal more than a mere conduit for the Chile Exploration Company. It was its brains or at least

the efferent nerve without which that company could not move."

Without reading from them I would like to call Your Honors' attention to two other cases that are similar. One is the *American Investment Securities Company v. U. S.*, 112 Federal (2nd) 231, which was decided in June of this year, on June 7, 1940.

The other one is *Industrial Bankers Securities Corporation v. Higgins*, 104 Federal (2nd) 181.

I was, I think, tempted to read from that case in part because it was tried by Mr. Green and by me. Certainly I can say this much, that I am as familiar with that case as I am with this one, and it is a curious situation, if the petitioner in that case is found to be something other than a mere holding company, and the petitioner in this case is found to be a mere holding company.

Having, as I hope, defined from the dictionary and from these cases what a mere holding company is, I think Your Honors will bear with me for a moment while I turn to the record and read a few short excerpts from it as to what the Maine Company did. I turn first to the testimony of Mr. Leonard, who is the president of the Transit Company, and I read shortly from his testimony. (R. 100)

Speaking of the time when a man named Mr. Spoor died, I asked him this question:

"*Q.* What change was there?

"*A.* Well, the change was that the Maine Company had come in—the officers of the Maine Company came west quite frequently.

"*Q.* Did somebody go out to the board out there?

"*A.* Sir?

"*Q.* Did somebody go on the board of directors?

"A. A Mr. Prince, who was president of the Maine Company, went on as chairman of the board of the Transit Company.

"Q. Did representatives of the Maine Company now begin to come west?

"A. Oh, they came west with increasing frequency and gave orders and directions what to do. We might send suggestions to the east, and they might come back in the form of an order.

"Q. And they might not?

"A. And they might not.

"Q. Now, take by 1930 to 1933, what was the relationship by that time?

"A. Well, the Maine Company was practically in the saddle, and I was about the hired man, I guess, you might say, and the orders came from the east and told us what to do and how to do it.

"Q. Was there any daily contact between—

"A. Oh, yes, there was.

"Q. Was there any daily contact between you men that were running the Transit Company and Produce Terminal and the District with the officers of the Maine Company?

"A. There was.

"Q. How was that contact?

"A. Telephonic.

"Q. And how often?

"A. Oh, frequently, many times a day.

"Q. Now, could you give me, Mr. Leonard, some examples of things that would be decided or handled by the Maine Company in the years '30 to '33?

"A. Well, during those years we had the banking crisis in Chicago, and the Transit Company and the various affiliate organizations were badly affected, and the Maine Company, or the easterners, handled the entire situation.

"Q. During this period, 1930 to '33, what would be the situation in case of changes in personnel out there in Chicago?

"A. Well, we would, if there was any of the principal officers, we would submit the names of successors to the east and for their approval.

"Q. And were the ultimate appointees chosen by you in the west or by the Maine Company?

"A. They were chosen by the Maine Company.

"Q. How about dividend policies?

"A. Oh, they were—they were decided by the Maine Company, what to do and what dividends to pay."

I am going ahead with this, but may I interpolate at this point, the majority said in its opinion that what was done in Chicago was done by Prince, and that I am going to deal with in a moment. But as you listen to me read this, will you just see how the witnesses put it. They don't say "Mr. Prince." See how that "Maine Company" comes up again and again in the testimony of these witnesses as they tell how they got their orders.

Member Opper: Mr. Welch, may I interrupt you a moment there?

Mr. Welch: Certainly.

Member Opper: I take it you will agree this witness was an interested witness?

Mr. Welch: Oh, indeed.

Member Opper: And therefore that the way to get at

the facts is to take the most unfavorable factors of his testimony more strongly, perhaps, than the favorable ones, that is to say, that if he makes an admission by what he says, that that is in effect an admission against interest, which is important in the case of an interested witness and perhaps wouldn't be in the case of a disinterested witness.

Well, I am not going to ask you to comment on that, but with that as a preliminary, I want to ask you what he means when he says "The Maine Company" or "the easterners." What does he mean by that?

Mr. Welch: I don't see what he could mean, except possibly the Jersey Company or the Maine Company.

Member Opper: "Easterners", in the plural, what does he mean by that?

Mr. Welch: Maybe he means Mr. McDonough, or other eastern individuals. I am perfectly willing to face the fact that he may have meant that.

Member Opper: Thank you.

Mr. Welch: Have I answered Your Honors' question?

Member Opper: I think so, yes.

Mr. Welch: I shall deal in a moment in my argument with what the situation is when human beings named Prince and McDonough go to Chicago and give orders.

(R. 102)

"*Q.* Did the Maine Company in those years have anything to say about where your funds were kept?

"*A.* Yes.

"*Q.* What did they have to say?

"*A.* They indicated the banks in which the funds should be deposited.

"*Q.* Now, you have authority, I take it, to sign checks, Transit Company checks, do you not?

"A. Oh, yes.

"Q. Is it within your power to draw a check for any sum that is in the bank, if you wish to?

"A. Yes.

"Q. Will you tell His Honor as a practical matter how you exercised that power?

"A. Well, anything that for large sums that the Maine Company are familiar with as we go along in daily routine, why, we don't consult them for the payment of those—the issuance of those checks, but any unusual large amount for—we would consult the Maine Company and obtain the authority."

Let me move for a moment to Mr. Henkle, a witness from Chicago.

Member Kern: At what page of the record?

Mr. Welch: I am now on page 164. I wonder if I gave the stenographer the page on the last one. If not, I will supply it for the record.

"Q. Mr. Henkle, I would now like to ask you what, if anything, the Maine Company, the taxpayer in this case, has had to do with this exposition?

"A. Well, we wouldn't have been able to hold it since 1934 if the Maine Company had not given us permission and authority to reproduce the buildings that burned."

Moving over to 168, speaking of the Produce Terminal now, Mr. Henkle was asked this question:

"Q. Was there any place to which you could turn for financing as you needed to expand?

"A. Well, we turned to the Maine Company.

"Q. Have you had occasion to do that in the past?

"A. Yes, sir.

"*Q.* Now, what part, if any, does the Maine Company play in the management of Produce Terminal, taking the years '30 to '33?

"*A.* Well, the Maine Company was constantly in touch with the affairs of the Produce Terminal and if we wanted any additions to the power house or the distribution lines, they were discussed with the Maine Company, and if they were authorized by them, then we could go ahead and enlarge our facilities.

"*Q.* Does the Produce Terminal make any reports of any kind to the Maine Company?

"*A.* Yes, sir.

"*Q.* What kind of reports and how often?

"*A.* They make a complete operating report every month."

I showed him this book and it was offered and put in evidence. He says, on page 169:

"This is a summary of operations for the month of December, 1933, containing 16 pages all relating to details of operation of the plant. That goes to the Maine Company every month."

And on page 170:

"*Q.* Who decides who shall make up the board of directors of the Produce Terminal?

"*A.* The Maine Company.

"*Q.* Who selects your bank depositories?

"*A.* The Maine Company.

"*Q.* Was there a substantial installation of new machinery in Produce Terminal in 1932 and 1933?

"*A.* Yes, sir.

"Q. Was that matter discussed with officers of the Maine Company?

"A. Yes, sir.

"Q. To what extent, Mr. Henkle?

"A. Well, Mr. Leonard and I figured out what we thought we needed in the way of additional equipment, and it was discussed with the Maine Company and they approved of our going ahead with the improvements.

"Q. Have there been any occasions, Mr. Henkle, when suggestions of yours as to something you wished to do about Produce Terminal have been turned down?

"A. Yes, sir.

"Q. Go back for a moment to that installation of machinery. From whence did the money come?

"A. It came from the Pau Corporation and the Pau Corporation received it from the Maine Corporation.

"Q. Can you give us a sample, Mr. Henkle, of a suggestion of yours on behalf of Produce Terminal made to the Maine Company which was turned down?

"A. Mr. Leonard and I felt we should have a larger addition to the power house than that we finally succeeded in getting, and we wanted a greater capacity and a larger power house than we succeeded in getting them to build.

"Q. When was that, Mr. Henkle?

"A. That particular instance was in 1936 and 1937.

"Q. I would like to ask you, Mr. Henkle, if the Transit Company makes reports to the Maine Company of its operations?

"A. It does."

And then I show him a book, and that is put in evidence.

"*Q.* How often is such a report made?

"*A.* Every month. It contains 32 pages."

I now go to Mr. Austin, Secretary and Treasurer of the Railroad, on page 220.

"*Q.* Mr. Austin, if some disaster such as a fire, or anything of that sort were to overtake the elevated structure—"

speaking now of the Railroad—

"—and it had to be rebuilt, what, if anything, could the Railroad Company do about it?

"*A.* Well, there is nothing to do but take the matter up with the Maine Company, have the Maine Company rebuild it and furnish the bonds."

The record reads "furnish the bonds" which I think probably was in error, for "furnish the funds". But I have read the record as it appears.

This same witness, on page 222, speaks of the Railway Company and the disbursement of dividends.

"*Q.* And under whose instructions are they disbursed as dividends?

"*A.* They are disbursed as dividends under the instructions of the Maine Company.

"*Q.* You spoke of depositing funds. Who selects the banks in which you make your deposits?

"*A.* That is selected by the Maine Company also."

I then go to Mr. Hackett, on page 247, testifying about the Central Manufacturing District and discussing plans being drawn:

"*Q.* After the plans are drawn and the contract is prepared and signed, or prior to signature, what would happen then?

"*A.* When I know that the concern really means busi-

ness, I communicate either by telephone or by letter with Mr. Prince, if he is available; if not, I confer with Mr. McDonough.

"*Q.* And in what regard do you communicate or confer?

"*A.* About the name of—I give the name of the company; I give his financial standing; I give the type of structure he requires and the location, in which district it may be. In fact, I give him a resume of the highlights of the whole thing, including the financial responsibility of the concern.

"*Q.* Then what happens?

"*A.* I either get permission to go ahead or if they don't like my prospect, or the type of building, they will turn me down. If I am permitted to go ahead, the money for the building is furnished by the Maine Company if we have insufficient funds in the District.

"*Q.* Now is this type of thing, Mr. Hackett, the only interest the Maine Company was showing in your operation in the years '32, '33?

"*A.* Oh, no, there was nothing of any importance that transpired in the District that I did not confer with the Maine Company about, whether it was a lease, a purchase, contract, failure of a lessor, a failure of a purchaser to go through with his contract, taxes, tonnages; in fact, everything of any importance I felt obligated to go to the Maine Company for instructions.

"*Q.* Do you have any system of reports to the Maine Company?

"*A.* We have a monthly report, which is sent to the Maine Company."

And then I deal with that some more.

Now, I go to Mr. McDonough, who testifies from the other end, he being the Assistant to the President of the Maine Company during the years in question; and I take him up first at page 313.

"*Q.* Will you tell us what your duties were then?" That is the period 1930-1933.

"*A.* Under Mr. Prince's direction while he was in this country, and while he was away, personally, I was continually on the telephone while I was in the East conferring with the operating men in Chicago, and directing the business policies of the company, the selection of officers and directors, bank deposits, general matters of policy, other than the actual routine operating of these companies.

"*Q.* Would it be fair to say that you were the chief executive officer of the Maine Company in Mr. Prince's absence?

"*A.* Yes, sir.

"*Q.* And when Mr. Prince was available?

"*A.* I consulted him first, and after the result of the conferences, our orders were passed on to Chicago and were carried out at once.

"*Q.* How was your time divided between the West and the East?

"*A.* I made two—I made at least two trips a month to Chicago, and if the occasion warranted it, I made more; and during the bank crisis, I was out there for several months.

"*Q.* Mr. Green points out to me that you said something about directing the policies of 'those companies'.

By 'those companies' did you mean the operating companies?

"A. I meant the operating companies.

"Q. In Chicago?

"A. In Chicago; yes, sir.

"Q. Taking the years 1930 to 1933, did you receive any reports of the operations of the units in Chicago?

"A. I did.

"Q. And by 'units' I mean, of course, the Chicago companies.

"A. The Transit Company; the Railway Company, the Produce Terminal Corporation, and the Central Manufacturing District.

"Q. When you received those reports, what did you do with them?

"A. I examined them and discussed them with Mr. Prince.

"Q. And as a result of that examination, or that discussion, would anything happen from time to time?

"A. Yes. The suggestions and orders would be given to the operating men in Chicago telling them what the Maine Company wanted them to do.

"Q. Now, will you tell us in a general way what sort of orders would go out from you to the Chicago companies?

"A. Well, if there were any changes in officers or directors, the manner in which bank deposits were handled, and what bank the moneys were to be placed, if there were any large sums requested for additions or improvements, or if the District wanted money to buy real estate or put through a big real estate deal, any matter that called for large amounts of

money that was out of the ordinary daily business, we would discuss and pass on them.

"Q. And after you had passed on them?

"A. Those orders from the Maine Company would be carried out at once, on the spot.

"Q. I think you have already mentioned the banking crisis in Chicago, as I call it.

"A. Yes.

"Q. You have already mentioned some transactions relating to the Chicago banks?

"A. Yes, sir.

"Q. I think you said you were out there at that time?

"A. Yes, sir.

"Q. What, if anything, did the Maine Company do about the way that whole matter was handled?

"A. The Maine Company handled and controlled the entire transaction from beginning to end. It controlled it by passing orders down to Mr. Reimers and to Mr. Leonard and Mr. Hackett. As far as Mr. Hackett was concerned, they were carried out forthwith.

"The Member: You are talking about the situation in the early part of 1933?

"The Witness: Yes, sir; at the time the bank was reorganized; yes, sir.

"By Mr. Welch:

"Q. Who decided what accounts were to be subordinated?

"A. The Maine Company, through Mr. Prince and myself; principally through me because I was on the spot.

"Q. And the amounts and the ranking of the subordination?

"A. Yes, sir; the amounts and the ranking and how they were placed; yes, sir.

"Q. When did you first become assistant to Mr. Prince, the president of the Maine Company?

"A. About 1926."

Skipping to page 321, and talking of a conversation with Mr. Prince:

"Q. Did he say anything else at that time, Mr. McDonough—refreshing your recollections; did he say anything about you going to Chicago?

"A. Yes, he told me that he wanted me to be familiar with the operations, because of the extra duties that were falling upon him in the Maine Company, because of taking over the active control of the properties in Chicago. He wanted me to go out there to the live stock show, become familiar with its purpose, to take and familiarize myself with all of the properties and with their workings, and to come to know who the people were who were in them, and to meet the people who were out there, to do business with them."

And, on page 322:

"Q. What would you say was the extent of your activities in managing the operating companies in the years in question here, 1930 to 1933?

"A. Well, in constant touch with them.

"Q. Were you doing anything else?

"A. Yes.

"Q. How much else? I mean by that, what proportion of your time and energies by 1930 to 1933 was given to the Maine Company and its interests.

"1. Practically all of it."

And on page 327, speaking of another conversation with Mr. Prince, he said:

"1. Mr. Prince again referred to the obligations of 1940. He told me that the opening of the bank would necessitate the subordinating of at least $4,000,000, and he very definitely made it clear that the Maine Company's subordination was to be treated entirely different from the others.

"He was most explicit in his instructions that I should see to it that the Maine Company's deposit would come—"

And then there is an interruption.

"As near as I can, he was most positive about how he wanted the Maine Company's deposit to be handled."

Now, those are excerpts from the testimony from men in Chicago who told what orders they got and how they carried them out, and from Mr. McDonough who spoke about how the orders were given and how they were obeyed. If it is suggested by one of Your Honors that a question of veracity was raised as to whether or not these witnesses should be believed when they said the Maine Company gave the orders, in all humility I say that that question was decided by the man who heard the witnesses, who saw their demeanor on the stand, and who is well qualified to judge, far better than anyone who has not seen them.

Member Smith: Mr. Welch, where is there anything in the record relative to any actions taken by the Board of Directors of the Maine Company in regard to these important transactions?

Mr. Welch: No; there is no such thing in the record.

Member Smith: How can these men in Chicago know it was the Maine Company directing them when they simply received their orders from Prince or his subordinates, and Prince being the president of the Jersey Company and the Chairman of the Board of Directors of the Railway Company and the Transit Company?

Mr. Welch: That question I am glad Your Honor asked because it merely leads me to the next point I wish to argue.

There came the time when these operating men in Chicago saw a man by the name of Prince and a man named McDonough, and those two men came out there and started giving orders.

The operating companies, those men out there, they knew who their stockholder was; it was the Jersey Company. They knew when Mr. Prince appeared in Chicago that he owned not a share of Transit, not a share of Railway, and yet here was a man coming out and saying he wished to go on that Board of Directors.

Does Your Honor imagine that had I gone out there and said, "My name is Welch and I would like to be on your Board of Directors," does Your Honor think I would have gotten on the Board? And when Mr. Prince says, "I would like to go on your Board of Directors," how come he gets taken on? He gets taken on purely because those men in Chicago now know he is the President of the Maine Company and that the Maine Company is what Mr. Justice Holmes calls the efferent nerve that is now directing this enterprise.

He had no other standing to get on those Boards and when he gets on those Boards, the majority wishes to suggest that he acted, not as the President of the Maine Company, but as an individual.

But he has no weight as an individual. He is not a stockholder. He has nothing to do with those companies except in so far as he is given power and authority by the fact that he is the President of the Maine Company, the genius, the brains, the efferent nerve that makes this thing happen. He cannot be just an individual. No individual can stroll into Chicago and have the power that he had, and his power can come from only one place, and that is the Maine Company, because that is the only company in which he is a stockholder and has a real voice.

And in connection with that; I think I would like to point out just one thing that happened. Take that bank crisis and the ten million dollars, half of which went down the sewer. Now, there was something of the most critical and grave importance. And can anybody read this record and fail to see that the Maine Company was the efferent nerve in that transaction? Was it just an accident that the Maine Company in the subordination agreement was put on the top level and that the other companies were put in their places?

And let me say a word about Mr. McDonough going to Chicago. He owns no Transit stock; he owns no Railroad stock; he isn't a Director of any of the companies. What gives him authority to speak in Chicago? Simply that he is the Assistant to the President of the Maine Company. He has no other position.

In view of the cases I have read to Your Honors, and in view of this record and the testimony of these witnesses and what happened, and particularly in relation to the bank crisis, how can it be said that the Maine Company was one of these inert companies who did nothing, and simply

sat there inertly and stupidly and held and did nothing else?

Mr. Clark: I am awfully sorry to interrupt but I understand I have a telephone call.

May I be excused for a moment?

Member Smith: Yes, and if there is no objection, I think we might recess at this time.

Mr. Welch: Yes, that is quite all right.

Mr. Clark: I would like to say—and this can be off the record—

(Discussion off the record.)

Member Smith: Then suppose we convene at 1:45. We will recess now until 1:45.

(Whereupon, at 12:20 p.m., a recess was taken until 1:45 p.m. the same day.)

AFTERNOON SESSION.

The Division resumed hearing at 1:45 o'clock p.m.; whereupon, the following proceedings in oral argument were had:

Mr. Welch: Before I leave this question as to whether or not the Maine Company was a mere holding company, I would like to say just one other thing about it.

Suppose it were faced with a capital stock tax, and suppose I sought a decision that I need not pay it, and it came before Your Honors, and I attempted to show that the Maine Company, in the words of the Chevrolet case, was a mere holding company, one of these inert companies; and let us suppose, if you please, I was so happy as to have His Honor, Member Opper, hear the case because I think he would give me the most hope when I came in on that; and suppose Mr. Clark tried it against me, and he came in and produced this record and showed what the Maine Company did, how far it was from one of these inert companies.

In all fairness would not this Division, if I tried it before this Division, say to me, "Oh, Mr. Welch, go away and draw your check and pay the tax."

I don't consider this point the most important point in the case. I feel deeply about it only because of this: It seems to me I have all the ammunition, all the law, everything my way on it and I shall not be proud of my powers of argument if I fail to convince this Division, or the Board as a whole, that this Maine Company was something other than a mere holding company and an inert, lifeless thing that did nothing.

I now pass on—

Member Opper: Mr. Welch, may I interrupt you to ask whether you were not, just before the recess, discussing

an answer that you were making to Mr. Smith's question to you, which, I think, was the result of some suggestion of yours, that this was a question of the veracity of these witnesses when they testified that it was the Maine Company that instructed them to do this, that instructed them to do that, and telephoned them several times a day, and so forth. Am I right about that?

Mr. Welch: If I understand Your Honor, you are, sir.

Member Opper: And I was just wondering, as I recall it, what you said, if you said that it was only because Prince came out there and was known to be the President of the Maine Company, and that he was elected to the Board and made Chairman of the Board, and so forth, of these operating companies.

What I wanted to ask you, was that the full scope of the answer that you proposed to make to Mr. Smith's question? I don't mean to be obscure about this, but what I had in mind was that I was hoping that you would go on from that and give us some light on this proposition.

Assuming that that was the reason—and I am not going to go into the question of whether or not it was——but assuming that that was the reason Prince was elected to these jobs, then when they had these conferences on the telephone, was it possible there was any way they could tell in what capacity it was that Mr. Prince was talking to them?

Mr. Welch: Now may I answer?

Member Opper: Well, yes; I want to go on with this.

Mr. Welch: Indeed, there is a way they can tell how Mr. Prince is talking to them, because if Mr. Hackett, for example, calls on the telephone and says, "I would like to build a building in the District and I need a half million dollars that I haven't got," and after the telephone con-

versation is closed, a check of the Maine Company comes through for the half million dollars, I should say that when Mr. Hackett glances at the check, there is no confusion in his mind concerning with whom he was talking. He gets the check of the Maine Company.

I should say when the men there in the West were having their fearful trouble with the bank situation and when they talked with the East, and if they wondered, as Your Honor suggested, with whom they were talking, when they got the orders of the Maine Company and the drafts of the documents drawn by the lawyers of the Maine Company to put its claims against the banks on the higher level, and when they got the word to do the trick, to do it this way, I should say these men had no doubt about who was speaking, and no doubt about what company gave to Mr. Prince the authority with which he spoke.

Member Opper: I don't mean to be frivolous, but I take it you wouldn't say, when they called on the telephone, or when somebody called them on the telephone that the voice would say, "This is the Maine Company speaking."

Mr. Welch: Indeed not. Human relations aren't that way.

Member Opper: And that the voice would be "This is Mr. Prince speaking," or, when they called up, "I want to talk to Mr. Prince."

Mr. Welch: That is correct, of course.

Member Opper: And therefore when they said on the stand that it was the Maine Company that gave them directions on the telephone, they were giving a conclusion which they drew from a number of different things. Is that right?

Mr. Welch: I think that is correct.

Member Opper: So that, in effect, when they testified,

it was not under what a very searching cross examination might have brought out under actual circumstances such that we would think of it as a fact; but they were testifying to a number of facts which, in the back of their minds, all summed up to the answer they made, in other words, the conclusion of the witness which was obviously, I think we all agree now, obviously not a statement of the fact as it actually occurred. That is, they did not get a statement "This is the Maine Company talking; you are to do so and so." Is that right?

Mr. Welch: Oh, yes. Your Honors would just wish to hit me with something if I claimed the people in Chicago would take down the telephone and say, "Hello," and hear "This is the Maine Company;" but, no, they would say, "This is Mr. McDonough," or "This is Mr. Prince."

But don't forget that corporations can't speak except through human voices. We have to have somebody like Mr. McDonough or Mr. Prince speaking through a telephone. When these men in Chicago draw a conclusion as to the entity with which they are dealing, you must bear in mind they draw it in the light of their experience and what happens to them. And, in particular, with reference to Mr. Hackett, as I pointed out, if after one of these telephone conversations he receives a check from the Maine Company that lets him build a building, is it any wonder that when he testifies in a court room about who it was with whom he was talking, that he says it was the Maine Company, since it was the check of the Maine Company he gets as a consequence of the conversation?

Member Opper: That is exactly the point I wanted to get at, Mr. Welch. I wanted to see if we couldn't clarify all of our discussion so that what we would come down to would be what we have just said, so that when Mr. Hackett said it was the Maine Company from which he got these direc-

tions, he was giving that testimony in good faith; and that was the conclusion he came to as a result of all the circumstances.

But you wouldn't impugn, for that reason, his veracity, and accuse him of testifying to something he didn't believe, though, perhaps you would ask yourself a question whether he was testifying to a fact or to a conclusion.

Mr. Welch: Well, I am not entirely satisfied with that. When Your Honor reads this record, I think you will perhaps be impressed with how these witnesses take the stand and say, one after the other, "It was the Maine Company that ordered us around," and "It was the Maine Company to whom we reported." "It was the Maine Company on the telephone."

Let us just bear in mind that those witnesses were here, after having lived some years in that situation, and I only say to Your Honor it is impressive to me that they felt the lash and the whip and the direction of the Maine Company. That must be the sum total of their experience, and they stated it on the witness stand. And it was to me, and I think will be to Your Honors, a very moving thing.

At this point Your Honor suggested something about throwing some light on something, and I am going to say very softly something Mr. Green wished me not to say. But it is said in the opinion that the Maine Company was the corporate clothes of Mr. Prince, that he put on corporate clothes, and wore them thereafter. I think in view of that it would be gracious to me to say that when Mr. Prince reached Chicago, he still wore his suit of corporate clothes.

I can't see how, in fairness, it can be said that when Mr. Prince gets out to Chicago, he forgets his suit, and he is just an individual. It seems to me it would have been a

little fairer to have him wear his corporate clothes in Chicago as well as in Maine.

Member Smith: May I interrupt to suggest that the language of the statute is "a mere holding or investment company". You have addressed your remarks to prove this is not a mere holding company. Have you anything to say to the question of whether a "mere investment company" might be something different from "mere holding company"?

Mr. Welch: I can't see any distinction there; it is the word "mere" that counts. "Holding" and "investment" seem to be substantially interchangeable terms. "Mere" is the key to it. It is the "nothing else but". I could strike everything I said on "holding" and say "investment," and it would be the same. It is the word "mere" that counts in this case and not "holding" or "investment".

And I think I have done all I can to indicate to Your Honors that this "mere" thing is just too hard for me to take.

Now, I go on to the next point in my motion.

Member Smith: May I ask you, Mr. Clark, have you any statement to make?

Mr. Clark: I have only one question, Your Honor. Your Honor asked petitioner's counsel this morning if there had been any records of Directors' meetings introduced into the record relative to the Maine Company and its handling of these affairs in the West.

I would like to ask petitioner's counsel if there is in the record anywhere even a letterhead of the Maine Company on which anything was written relative to these instructions or directions.

Mr. Welch: I don't know just how to answer that.

Mr. Clark: Well, do you have any recollection? There either is or isn't, and if you can't recall, and I can't, I don't remember myself—and I wonder if you do.

Mr. Welch: I have this difficulty, that I hesitate because I am in some other litigation involving the Maine Company, where there were quantities of correspondence involved. Can't you say?

Mr. Clark: No I can't.

Mr. Welch: It is an extremely voluminous record and I can't say to Your Honors definitely I have a recollection of seeing that letterhead in this case.

Mr. Clark: That is all I had to suggest.

Mr. Welch: In Paragraph 20 of my motion, I move that the Board strike out finding of fact No. 45, and substitute this finding:

> "During the years 1930, 1932, and 1933, the petitioner did not permit its gains and profits to accumulate beyond the reasonable needs of its business."

In connection with this portion of my argument, I have again prepared some chalks that will help Your Honors in following what I have to say, (distributing copies of two-page statement or tabulation). And may I ask that the stenographer copy the two into the record at this point so that the other members of the Board can follow it when the time comes?

CHICAGO STOCK YARDS ENTERPRISE

Statement as of December 31, 1929 and December 31, 1933, showing obligations which must be met and liquid assets in whole enterprise available to meet them upon two bases:

Basis I that Jersey Co. be liquidated in 1940

Basis II that Jersey Co. life be continued beyond 1940

(Figures from Respondent's Exhibit C)

Basis I

	As of Dec. 31, 1929	As of Dec. 31, 1933
Obligations		
Jersey bonds due 1940	14,000,000.	14,000,000.
District bonds due serially up to 1940	3,909,000.	2,250,000.
Railroad bonds due 1945, maturity accelerated by liquidation	2,327,000.	2,327,000.
Transit bonds due 1930	500,000.	0
Total bonds Jersey and its subsidiaries	20,736,000.	18,577,000.
Jersey Pfd. not owned by Maine Co.	6,453,400.	6,263,800.
Bonds and Pfd. not owned by Maine Co. ahead of Jersey Com.	27,189,400.	24,840,800.
Maine Co. bonds due 1961, maturity accelerated by liquidation	3,227,000.	2,620,000.
Total obligations	30,416,400.	27,460,800.
Liquid Assets of Enterprise		
Maine Co. and Produce Terminal	12,110,800.	14,014,400.
Jersey Co. and subsidiaries	*9,594,300.	3,815,500.
	21,705,100.	17,829,900.

* (Includes impounded funds $2,013,500. released to Transit Co. in 1932)

Brought Forward	21,705,100.	17,829,900.
Less minimum working capital	5,000,000.	5,000,000.
Available assets	16,705,100.	12,829,900.
Excess of obligations over liquid assets available	13,711,300.	14,630,900.
Excess of obligations $919,600. greater in 1933 than in 1929		

BASIS II

If Jersey Co. continued beyond July 10, 1940, the maturities of the Railroad and Maine bonds would not be accelerated in 1940 and it would not be necessary to buy or pay Jersey Preferred at or by 1940. Payment of these items would be postponed.

Obligations outstanding to be met by 1940 were—

	As of Dec. 31, 1929	As of Dec. 31, 1933
Obligations		
Jersey bonds	14,000,000.	14,000,000.
District bonds	3,909,000.	2,250,000.
Transit bonds	500,000.	0
Total obligations to be met by 1940	18,409,000.	16,250,000.
Liquid Assets of Enterprise		
Maine Co. and Produce Terminal	12,110,800.	14,014,400.
Jersey Co. and subsidiaries	*9,594,300.	3,815,500.
	21,705,100.	17,829,900.
Less minimum working capital	5,000,000.	5,000,000.
Available liquid assets	16,705,100.	12,829,900.
Excess of obligations over liquid assets available	1,703,900.	3,420,100.
Excess of obligations $1,716,200. greater in 1933 than in 1929		

* (Includes impounded funds $2,013,500. released to Transit Co. in 1932)

I shall, as my argument proceeds, call Your Honors' attention more closely to this chalk, which is made up from the testimony in this case than I mean to do at this moment. I want to begin by calling Your Honors' attention to the situation of the Maine Company at the end of 1929, as appears from Exhibit S-52 of the record. As of the end of 1929—and I am not now speaking from this chalk; I am saying something outside the chalk—the Maine Company had invested in Jersey common the sum of $10,993,551, and it owned 58,742 shares—shares of the Jersey common. That stock ownership, that eleven million dollar investment plus the contract with the other Jersey shareholders by which their excess earnings over 2 percent went to the Maine Company, is the heart of the Maine Company. That is what makes the Maine Company click. It is its ownership of that stock and its contract with the other stockholders that produces substantially all of its income, as we know.

And I want to fix firmly in the minds of Your Honors that at the end of 1929 the Maine Company has eleven million dollars invested in that stock. Now, at the same moment, what is the situation of the Jersey Company? Such income as the Maine Company permits it to receive comes all from the Railway and the Transit. Its principal assets are Railway and Transit and District.

Now, as I said earlier in my argument, these are a unit and each depends on the other. The cash of the Jersey Company was only $400,000 and its only other asset that had any substantial value was Indiana Harbor Belt Railway bonds, worth $2,500,000.

Now, ahead of the common in this picture, which is what the Maine Company had its whole life invested in, ahead of the common there were charges on the earnings in this enterprise, and what were these charges? First, there were fourteen million dollars of Jersey bonds that mature in

April, 1940, and those bonds are secured by the Railway stock and the Transit stock and these Indiana Harbor Belt Railway bonds.

Ahead is $3,909,000 of District bonds. They are secured by a mortgage on the District real estate. They are also guaranteed by the Jersey Company.

Next there are the Railroad bonds of $2,327,000, which mature in 1945.

Mr. Green wishes me to say, and he is right, that these bonds are secured by nothing of any value except the guarantee of the Jersey Company. The Railroad Company, as Your Honors will remember, is in receivership.

Also ahead of this common is the $6,500,000 of the Jersey preferred, with the 6 per cent dividend requirement.

Also ahead in 1929 are the $500,000 Transit Company bonds due in 1930. And also there must be considered the Maine Company's bonds of $3,227,000, each one thousand of which is secured by five shares of the Jersey common.

Now, as I have said, the Maine Company has this huge investment in this Jersey common in 1929, and as it stood at the threshold of the period that is here in question, the men who ran it had to make up their minds, as business men, what the Maine Company should do about its position.

They had made up their minds years ago, indeed, but let us assume for the fun of it, that they have to make up their minds freshly in 1929. There is one alternative open to them which I discussed in the court room when I was here last, and that is the alternative to let the Jersey common drift; take out all the earnings, not only of Jersey, but of the subsidiaries, and sometimes more, as they have done for years and years; declare dividends from the Maine Company; have a gay time with it; and let 1940 take care of itself.

Now, the other alternative—and I will put the other alternative as simply to do something about Jersey in 1940, and that, again, could be sub-divided either to liquidate it or in some way to extend its life.

I hope I make myself clear. Assuming the Maine Company had to make up its mind afresh in 1929, what it had to do after 1940 came around, as 1940 came along, first it could let Jersey drift; or, secondly, it could plan to do something. And, by planning to do something, it could plan either to liquidate or extend its life.

I don't think there is anyone who thinks Maine should have allowed Jersey to drift, but I would like to take a moment to think it through. As I have pointed out, in 1929 the Jersey Company had $400,000 of cash. Now, if it had been allowed to drift when 1940 came around, fourteen millions of bonds, of Jersey bonds, would have become due, and the Jersey Company would have had exactly $400,000 with which to pay them off.

On the drift policy, what would have happened? There is only one thing that could have happened. The trustee of those bonds would foreclose, and he would sell the assets back of the bond issue, meaning the Transit and the Railway stock, and the Indiana Harbor bonds.

Now, had that happened, if that sort of a forced sale took place, I don't suppose in December of 1929 that you could have looked forward to that kind of forced sale and hope there would be any surplus left after the trustee got his fourteen million dollars. Let us assume, however, that there would be a surplus.

The District bonds would now be in default because we know the Maine Company had to meet the District serial maturities, and we are now on the drift policy, so that that would not have been met. Those bonds were secured by

Chicago real estate—and there is nothing blacker in this period than Chicago real estate, and the real estate mortgage presumably would have been foreclosed and presumably there would have been a deficit there. Had there been a deficit; the trustee of the bond issue would have jumped on the surplus in the Jersey Company if there were a surplus after foreclosing that fourteen million dollar bond issue, and fastened on to his share of that surplus.

What next? The trustee of the Railway bonds wakes up. He observes the Jersey Company is being allowed to drift and its assets are all disappearing and he has its guarantee; he hops on that surplus, if there is one.

What next? The trustee of the Maine Company wakes up and finds his collateral is gone. He jumps on that surplus. His collateral is Jersey common stock, and Jersey is being allowed to drift, and its assets are being taken away from it by the trustee under the mortgage. He jumps on the Maine Company, naturally, to the extent of its funds.

Then what? After all this has happened, the Jersey preferred shareholders come around and take a little look at the carcass, and, if there is anything there, they say, "Well, we have six and one-half millions coming to us." And I suggest to Your Honors that by no wildest stretch of the imagination could anything happen on the drift theory, except that, in the last analysis, if there is anything left at all, the preferred shareholders pick up the hide and the bones of the Jersey Company and go away with it.

And then what has happened? The Maine Company which had an eleven million dollar investment in Jersey common has just committed suicide. It is sunk. It has nothing left to hold that is of any value and it has no hope for the future.

And now, at this point, let me say this, with all the persuasiveness of which I am capable, whatever the Maine Company is, whether it is a mere holding company or not, whether it is a mere investment company or not, and whether or not it is the merest mere of those two things, at least it had this business purpose: It had a business purpose to see to it that it continues to hold and that what it held continued to have some value.

I mean by that, that on any basis whatever, as you look at the Maine Company, it certainly was within its reasonable business needs to see to it that the eleven million dollars that it had invested in 1929 in Jersey common did not disappear. The smallest duty and the smallest reasonable need it had was the need to protect that eleven million dollars.

And so I say, when we assume that the Maine Company stands at the threshold in 1929 and looks forward, it is clearly within its reasonable means to plan to do something about the Jersey Company when 1940 comes.

Now, there are two things it can plan to do. It can plan to liquidate, or it can plan to extend Jersey. The testimony was that it planned to liquidate, that it had always planned to liquidate. The Board, as I view it, takes the position that we ought to have planned on extending. I wish now to show Your Honors that no matter which plan it had adopted, it did not, as of the end of 1929, have sufficient assets with which to carry out its plan; and I wish to show Your Honors from the little chalk you have before you that during the period here in question, 1928 to 1933, it made no progress in either of those directions.

If Your Honors would be good enough to glance at the chalk that is before you (see this record p. 65), you will observe that on Basis No. 1, which is the basis of liquidation,

as of December 31, 1929, the total of the column of obligations is $30,416,400.

You will observe that the liquid assets available to meet those obligations less the $5,000,000 working capital, are $16,705,100, and that the obligations exceed the liquid assets by $13,711,300.

Then will Your Honors be good enough to look at the column as it appears as of December 31, 1933. In this column the obligations have shrunk somewhat; they are $27,460,800. But, in turn, the available liquid assets have also shrunk, being down to $12,829,900. And the obligations exceed the liquid assets by $14,630,900. And if you will compare those two figures at the foot of the column, you will find that during the period here in question, when this taxpayer is charged with having unreasonably accumulated, the enterprise, as a whole, has actually lost ground on its program of liquidating the Jersey Company.

And now, let me turn, if you please, to Basis No. 2, which, as I understand it, is that which the majority thinks the more reasonable one for the Maine Company to have adopted. That is the basis of extending the Jersey Company in some way, by doing some fresh borrowing and fresh financing, to keep the thing going.

I may say that that alternative had certain advantages in this respect: Some things that have to be paid on the liquidation plan can be postponed on the extension of the life of the Jersey Company plan. But I don't want to pass this point without reminding Your Honors that every expert who testified in the court room agreed that the extension of Jersey was silly and unbusiness-like; that it was silly to keep that extra taxpayer, that inert company, there, vulnerable to taxes and serving no useful purposes; and with these rather fearsome charges of 9 percent on its

common and 6 percent on its preferred; and everyone agreed on both sides that it should be liquidated.

But even taking the extension theory, under that theory on Basis No. 2, the total obligations that have to be met by 1940 are $18,409,000. The available liquid assets in 1929, less the working capital, are $16,705,000. And the obligations exceed the assets by $1,703,900, even on this basis.

In other words, as the company stood at the end of 1929, even if it planned on extending the life of the Jersey Company, if was not yet on safe ground and did not yet have enough funds with which to do it.

Now, glance, if you will, at the next column, at the end of 1933. Again the obligations have shrunk somewhat. On this basis, they are now $16,250,000. And, again, the liquid assets have shrunk and are $12,829,900. And at the end of 1933, the obligations exceed the liquid assets by $3,420,000.

Once again, in the very period in which this company is accused of having unreasonably accumulated, it has really gone backwards. The enterprise, as a whole, has gone backwards, either on the liquidation plan or on the plan of extending the Jersey Company.

Now, why this seeming paradox? Why is it that in a series of years when the Maine Company is accused of having unreasonably accumulated a surplus, I say that the program, the 1940 program, actually receded in view instead of approached in view? There are two answers. One is that cataclysm in the Chicago banks that sucked up ten million dollars of the enterprise, half of which, so the testimony shows, is never coming back. That is one explanation.

The second explanation is that the Maine Company continued its business habit established all through the years, of sucking up into the Maine Company dividends from the underlying companies, whether they were earned by those companies or not.

The consequence was that, while if you look at the Maine Company alone, it seems to be richer, it has become richer only because every other company below that level has become poorer; and the enterprise, as a whole, is worse off in 1933 than it was in 1929.

May I say one other thing, too, as to the last column on these two little chalks? On both sheets. The majority insists that the Maine Company, and thus the enterprise as a whole, should have been approximately eight million dollars worse off in 1933 than appears on this table, because the majority solemnly insists that out of the roughly $9,600,000 of earnings of the Maine Company, only $1,600,000 of which went out in dividends, the majority says the whole should have gone out, so that the last figure on these two sheets, if the majority is right, should have been eight million dollars worse than it is on the sheets I handed up to you.

Now, what did the majority, as I understand the majority, have in mind as to what they think should have been done when 1940 comes? I think the key to it is found in the majority opinion on page 32 (41 B.T.A. 620). On that page Your Honors point out there was approximately $40,000,000 excess of assets over liabilities at the end of 1929. And I think the inference is not only that the Maine Company should plan on extending the life of the Jersey Company, but also it should plan on doing some borrowing if need be, when 1940 comes, to accomplish whatever the Maine

Company finds it must accomplish about the Jersey Company.

I quarrel with the Board to this extent: I cannot believe that it is unreasonable for a concern in the position of the Maine Company to plan to pay debts. I cannot believe that the old-fashioned idea that it is moral to pay debts and moral to rid an enterprise of its debt structure has lost its validity. I think the Maine Company might certainly reasonably plan on paying the debts. But let us assume, as I think the majority intimates, that it should have planned on doing some borrowing.

Again, Mr. Green—and I thank him—reminds me that there is authority in our tax structure for paying debts, and that is found in the personal holding company tax. Even that tax will allow a credit to a taxpayer, if the taxpayer accumulates funds to pay debts acquired before the passage of the Act. And it may pay these debts out of income and Congress saw to it that it may.

But now let me consider this, what I think is the theory of the Board that somebody could do some borrowing in 1940 and I would like to think it through with you. Who is going to borrow the sums here involved?

Certainly not the Railroad Company, that is the traction company. It has been hopeless for years. It has bonds outstanding that are worthless, were it not for the guarantee of the Jersey Company.

Well, certainly not the Harness and Saddlery, that funny little harness store.

Certainly not the Pau Corporation. It owns some easements only.

Certainly not Produce Terminal. Produce Terminal is regulated by the Illinois Commerce Commission. Its rates

are based on its capital structure. Can any one imagine that the Illinois Commerce Commission would have allowed Produce Terminal to borrow money to be swept up-stream in an up-stream loan to the Maine Company? That was impossible.

Certainly not the Railway Company. It couldn't borrow. It is under the Interstate Commerce Commission, governed by it. Not for a moment would the Interstate Commerce Commission permit the Railway Company to borrow for an up-stream loan, as was testified to in the case, and as is clearly so.

Certainly not the Transit Company. Its charter prohibited it for one thing; and, for another thing, the Transit Company is regulated by the I.C.C. just as the Railway. And, for good measure, is regulated by the Department of Agriculture as well.

Certainly the District couldn't have done the borrowing on the scale we must be talking about. It owns Chicago real estate, and testimony is that it was never able to borrow on its own, that in every instance, it had to have its bonds guaranteed by the Jersey Company, and when its serial maturities came along, it had to get the cash from the Maine Company with which to meet them.

Then, who could borrow it? There are just two possibilities, the Jersey Company or the Maine Company.

And what could those two companies offer as collateral against the borrowing? They could offer only Transit stock or Railway stock.

I cannot believe that this Board is so far removed from the realities of life that it does not know that from 1929 forward, that type of issue was in such discredit in this country that it was almost hopeless to put out a collateral

trust issue. Indeed, it is almost hopeless to this very day, except that I have noticed within the last few days one substantial collateral trust mortgage that has gone out. That type of financing had on it the 1929 taint, and it was highly unpopular.

That isn't the only reason the Maine and the Jersey Company could not have borrowed when 1940 came around. There was a cogent reason why they couldn't and that reason was the passage of the personal holding company tax. Both Jersey and Maine, from 1934, forward, have been held by the Commissioner to be personal holding companies. Once again, I think this Board cannot be so far removed from realities as not to know that no personal holding company can now make long term borrowing. And at the risk of explaining the obvious to you, I will state why: As everyone in this court room knows, a personal holding company nowadays must declare out all of its income. It has that choice, or else the choice of letting the Government have 75 per cent of it.

Now, when lenders look about for people to whom they would like to hand out their money, will they so much as give a smile to a personal holding company? They will not; and why not?

They will not, for this reason: No lender, on the scale we are now talking about, will lend to a company that cannot amortize its debts out of its income. And a personal holding company may not amortize out of income for a debt incurred in 1940. If, prior to 1934, as I have said, if it has such a debt incurred prior to 1934, as I have said, it may; it cannot for a debt incurred afterwards.

And so a lender, looking toward a personal holding company, and the only two possible borrowers here were Jersey and Maine, sees this situation. There is no place to go but

downhill for such a company. Whatever it earns, whatever profits it makes, those it must push out. And, on the other hand, if disaster overtakes it, the loan is bad. And on the basis of prosperity, a holding company cannot pay its loans and cannot amortize out; and on the basis of adversity, of course, it cannot.

And so, as events turned out, had the Maine Company in 1929 looked forward to borrowing in 1940, it turns out that it would have followed the path of folly and despair. It could never have done so.

If Your Honors please, what I have said about the reasonableness of accumulating to meet the 1940 situation in some way, seems to me cogent and persuasive. It seems to me that I must at least have made some progress in indicating to Your Honors that with this eleven million dollars at stake in the Jersey Company, that the Maine Company had to do something to protect it and that it had to plan on either liquidating the Jersey Company, or, at the lowest, extending it, and that on neither basis did it have enough funds on hand at the end of 1929, and that on neither basis did the enterprise, as a whole, make any progress towards that end.

But I think, Your Honors, at least the majority have something else in mind. On page 31 (41 B.T.A. 619) the majority points out—

About a dozen or fifteen lines from the bottom of the page.

First, there is a table in the middle of the page and then the next paragraph in the middle, the majority says:

> "As above indicated, the petitioner was obligated to pay off only $3,227,000 of the $23,963,000 bonds outstanding at the end of 1929."

That is to say, the majority points out pointedly that the petitioner didn't actually owe these debts that I kept talking about.

Now, frankly, I didn't think it mattered whether the Maine Company actually owed those debts or not. The reason I didn't think it mattered was this: I was talking about business men and their purposes, their intent, and the way in which they ran a business. It was my hope that as I tried the case I would demonstrate to the Member who heard it, and indeed I did, that there was so cogent a business reason for accumulating to take care of the Jersey situation, that no man in his senses, and no company in its senses, would fail to accumulate and to get in a position to take care of the 1940 crisis.

I think I find, however, that that is not quite satisfactory to the majority. They wish to be shown that there was a legal obligation on the Maine Company to pay off. I will deal with that legal obligation in a moment, but before I leave this, I would like to make one more attempt with the majority. Let me put it to you this way:

Suppose in 1911 what the Maine Company had acquired instead of what it did acquire, was a huge block of real estate. Let us assume, if you please, that it acquired a block of real estate worth, let us say, ten millions; and suppose it paid five millions in cash for it; and that when it took the real estate it was subject to a mortgage of, let us say, five millions.

Now, don't misunderstand me. It is merely subject to a mortgage which the Maine Company doesn't assume and undertake to pay. It is not obligated to.

Now let us assume that after the Maine Company gets the real estate, it places a mortgage of five millions of dol-

lars on the real estate to build five million dollars of buildings and it rides along—that is, the second mortgage.

And let us assume, as would have been the case, that this time it signs the mortgage notes; it promises to pay that five million. It didn't promise to pay the original five million, but simply took the property subject to the mortgage.

Now, as the Board thinks, as it seems to me it thinks, the Board would say it would be all right for the Maine Company to accumulate five million dollars to pay off the second mortgage which it actually promised to pay, because it would be legally obligated to pay it. But at the same time it seems to me they would say, "It won't be all right for the Maine Company to accumulate funds with which to pay off the first five million dollar mortgage because it never really promised to pay it. It was not obligated to pay it."

I hope that the majority will ponder on this for a moment. What difference does it make in the way business men conduct their lives, whether or not the Maine Company, in the case I have put to you, was actually on one note and not on the other? Both were loans ahead of its equity. Both had to be taken care of when they became due, or the equity would disappear.

Now, compare that with the situation of the Maine Company and the Jersey Company; when 1929 came around and the Maine Company had this eleven million dollars invested in Jersey common, it was, as I have pointed out to Your Honors, in substance, the owner of the equity, subject to these mortgages, these charges I have talked about.

And what difference does it make whether it was obligated to pay them in the sense of being legally obligated or not? I never thought it mattered but because it now

seems to me the Board thinks it does matter, I now wish to point out to the Board that the Maine Company was actually legally obligated to pay the creditors and the preferred shareholders of the Jersey Company.

And to do that I wish to call Your Honors' attention to Exhibit S-46, which I take the liberty of handing up, although I don't speak of it pointedly at the moment in the sense that I want your Honors to follow it (handing exhibit up to the bench).

I should like to add that I make this argument to Your Honors, in part, because of a statement of His Honor Member Kern, that appears on page 92 of the transcript of the last hearing. In that argument Mr. Kern asked of my brother, Mr. Clark, if there was any contention that there was a legal obligation on the petitioner at any time. Had Your Honor asked it of me, I should have said there was and I now make that contention, and I assume Your Honor asked that question because Your Honor thought it might be of some importance.

I am now calling your Honors' attention to what is called the "by-pass" agreement, Exhibit S-46, and I am about to call Your Honors' attention to a line of cases.

First, I want to speak on this "by-pass" agreement, so-called. That was an agreement entered into on October 1, 1914, after the Maine Company, as I put it, moved in on the Jersey Company and started to dominate its life.

That agreement was an agreement by which the Jersey Company solemnly agreed that from the date of its execution forward, no income from Transit and Railway should ever reach Jersey; that the Transit and Railway income should be used first to pay the interest on the Jersey Company bonds, its expenses and its taxes, and that thereafter every dollar of it should go direct from the operating

companies to the Maine Company and never touch the Jersey Company treasury.

That is fundamental to what I proceed to argue, and I can't make it too clear. On that date the Jersey Company foreclosed itself forever from ever accumulating any funds to take care of its own financial future.

Now, having pointed out that agreement to Your Honors and the effect of it, I wish to call your Honors' attention to two cases. The first one is *Taylor v. Standard Gas and Electric Company*, 306 U.S. 307. That case is a fascinating case. The facts in it are too complicated and too long for me to state adequately in decency to Mr. Clark, who doesn't want to remain here too long.

Mr. Clark: Oh, that is quite all right.

Mr. Welch: Thank you.

I am confident Your Honors will read it, however, and when you read it you will find that this, at least, was the heart of the situation. That was a reorganization proceeding that got passed on by the Supreme Court of the United States, and involved in the reorganization proceeding was this situation: There was a top company that dominated the life of a subsidiary. I won't go into all the things it did about dominating, but it dominated it, it kept it poor, and finally the result of the domination was that the subsidiary became bankrupt.

In the course of this domination by the top company, the subsidiary became indebted to the top company on perfectly proper transactions to the tune of about five million dollars. And when a plan for reorganization was presented, the plan that was presented gave the top company, in the reorganized concern, a preference over the preferred shareholders of the subsidiary company, because it was a perfectly honest creditor to the extent of five million dollars.

and the lower judge said that it seemed all right, despite all the other sins, that Your Honors will see if you look at the case that it seemed all right that the top company, as the creditor, should be preferred over the preferred shareholders to that extent.

The Supreme Court of the United States said that that action on the part of the trial judge amounted to an abuse of discretion; that he could not be permitted to allow a top company to run a subsidiary into a disaster and assert that it had any standing except a standing below that of its preferred stockholders.

And speaking of what that top company did, some language was used that I found distinctly interesting. I am speaking now from page 323 of the report. Mr. Justice Roberts said:

> "It is impossible to recast Deep Rock's history and experience so as even to approximate what would be its financial condition at this day had it been adequately capitalized and independently managed and had its fiscal affairs been conducted with an eye single to its own interests."

And as I read of that, I thought of the Jersey Company. Can it be said that that company has been managed with an eye single to its own interests? Has not that company been managed with an eye single, really, to the interests of the Maine Company?

And, in the concluding paragraph:

> "No plan ought to be approved which does not accord the preferred stockholders a right of participation in the equity in the Company's assets prior to that of Standard, and at least equal voice with Standard in the management."

And in connection with this case, may I call Your Honors' attention to another case, before I take up this so-called by-pass agreement? And that is the case of *Vallery v. Denver & Rio Grande Railroad Company*, appearing in 236 Federal at page 176.

In the *Vallery* case, as in this case, a top company dominated a subsidiary and a mortgage of the subsidiary became due. The top company allowed the mortgage to go to foreclosure and committed the additional sin of bidding in the property that was foreclosed at the foreclosure sale. Then the subsidiary went bankrupt and a receiver was appointed, and he attacked the sale and the conduct of the top company. The top company was held liable, and I should like to call attention to the language in this case, appearing on page 181 of the opinion:

> "Under the allegations of the complaint, the Denver & Rio Grande, at the time of the several transactions in regard to the pledge and sale of this stock, was a trustee of the assets of the Midland Company so far as the creditors of the company were concerned . . . ."

That is to say, the Court says that when a top company is indifferent and callous as to what happens to a subsidiary, and if its subsidiary goes into bankruptcy, the top company becomes a trustee of every dollar that it ever took out of the subsidiary; and the two cases together hold that that top company must hold in trust whatever it took and must see the subsidiary through when the crisis comes.

One more sentence from the *Vallery* opinion:

> "It was the duty of the Denver & Rio Grande to make every effort to prevent a foreclosure and sale of the pledged stock."

Similarly, under the doctrine in those cases, it was the duty of the Maine Company to see to it that no mortgage on Jersey collateral was foreclosed, and to see it through when the 1940 crisis came.

Now having called your attention to these two cases, I wish to call Your Honors' attention to only one other thing and then pick up the agreement of which I am talking. In 6 Fletcher's Corporations, page 716, this doctrine, of which I have been speaking to you, is put in this way:

> "The holding company is bound to act in the utmost good faith towards the creditors of the held company, and must make every effort to prevent a foreclosure of the latter."

In view of this law that I have stated to Your Honors, I should like now to pick up and call Your Honors' attention to one or two clauses in this by-pass agreement, as we have called it. Exhibit S-46.

The document has some recitals in it, and the last recital is this:

> "And whereas the parties hereto desire to simplify their financial relations and operations for their mutual benefit and protection of the various creditors, holders of securities, and shareholders, respectively."

That is to say, there is a recital in the document that those who drew it and executed it had in mind the claims of creditors and shareholders, and so forth. That appears in the Whereases, and then in the contractual part, this phrase:

> "All income of the New Jersey Company hereafter received or collected by it from any source whatever, shall be by it applied first to the payment of its own expenses; second, to the payment of all taxes payable

or chargeable to the New Jersey Company; and the surplus then, if any, remaining, shall be paid to the Maine Company upon its request, but subject, however, to any agreements or obligations on the part of the New Jersey Company now existing."

Listen to those words precisely like the words in a mortgage—

"subject, however, to any agreements or obligations on the part of the New Jersey Company now existing."

Then, at the last of it, there is this delightful phrase:

"The President or Treasurer of the Maine Company and of the New Jersey Company, respectively, may, from time to time determine all questions which may arise relating to the accounts between the said companies, and may make such payments from one company to the other, as may be necessary or convenient, in order to carry out the true intent and purpose of this agreement."

The contract is signed on behalf of the Jersey Company by Frederick H. Prince, its President. That is the same Mr. Prince who we all know is the President of the Maine Company. Imagine Mr. Prince as President of the Jersey Company, meeting himself as President of the Maine Company, and arbitrating any difference between the two companies that might arise under this contract. Isn't it obvious that when that contract went into force, that the Maine Company simply paralyzed the Jersey Company, simply made it impossible for it ever to have an independent economic life, and made it impossible for it to meet its bonds when they became due, or to do anything for its preferred shareholders? And since that contract had that effect, I say to Your Honors that as Jersey earnings went into the Maine Company, they went in subject to a charge,

as was spelled out in the contract and as was spelled out in the doctrine of the cases to which I called Your Honors' attention; so that as each dollar reached the Maine Treasury, it was fastened with a duty and the charge of a trustee to see the Jersey Company through.

I think I make it clear that I do not claim, Mr. Clark, that the Maine Company put its own capital behind this guarantee. I only say that as it sucked it up—the income—every dollar that came out was impressed with what the Vallery case calls the "trust", and that the Maine Company could not have pushed it all out to Mr. Prince and not have become liable, if it had done so; and Mr. Prince, in turn, would have become liable.

And let me say this: That this is no fantastic thing I am discussing with Your Honors.

I shall go almost from this court room, a Federal court room, to another Federal court room, in which a minority stockholder of the Jersey Company is asserting the very point that I now assert to Your Honors. I should be grateful, indeed, if Mr. Clark could furnish me with any legal answer to make to him. I am grateful for one thing. I am grateful that I am able to point out that the Maine Company did see the Jersey Company through; and that when it came time to have its debts paid and its preferred stockholders paid, the Maine Company was in funds with which to do it and it stood by and saw the Jersey Company through.

Now, if my troubles in this case—which I have never been able to understand—but if they were in any sense due to the fact that the majority thought the secret of their decision was that the Maine Company was not obligated to pay the Jersey charges, I beg of you, read these cases to which I refer, read this by-pass agreement and I am confi-

dent that if only that is needed to turn this decision my way, the turning will come quickly.

I want to take a moment to call attention to something in this case that so far seems to me somewhat lost sight of, and that is the Regulations that apply in a 104 case. They are ancient, as we all know. They have great force because of the fact that they are ancient. And may I point to what I think is important:

> "When one corporation owns the stock of another corporation in the same or a related line of business, and, in effect, operates the other corporation, the business of the latter may be considered in substance, the business of the first corporation. Gains and profits of the first corporation put into the second through the purchase of stock or otherwise, may, therefore, if a subsidiary relationship is established, constitute employment of the income in its own business. To establish that the business of one corporation can be regarded as including the business of another, it is ordinarily essential that the first corporation own substantially all the stock of the second. Investment by a corporation of its income in stock and securities of another corporation is not without anything further to be regarded as employment of the income in its business."

I am reading, of course, from Article 542, of Regulations 77—and they are familiar, I am sure, to all Your Honors.

Is there any doubt that the Maine Company and the Jersey Company were in the same or related lines of business? Let us think for a moment. Whenever a cow or a hog went into the stock yards at Chicago and paid 35c for hotel accommodations, the Jersey Company smiled because it meant something to the Jersey Company; and the

Maine Company smiled because it meant something to the Maine Company.

If a car of freight was loaded on the railway, it meant something to both. Is there any doubt about their being in the same or related lines of business?

Both are holding companies. Both look ultimately to what happens in Chicago. And we are right squarely under the Regulations, unless it be the clause where it says, "It is ordinarily essential that the first corporation own substantially all of the stock of the second." "Ordinarily"—not "necessarily".

But don't we own substantially all of what counts? The common stock? And, after all, isn't the key to the Regulations the domination of the one company by the other? Isn't that what counts and doesn't that situation exist here?

And so I say that in reconsidering this case, I would be grateful, indeed, to the majority if it would again seriously consider these Regulations. I think they have a very important bearing on this case.

Now, I have argued that the Maine Company is not a mere holding company, and that Your Honors should change that finding and give me mine. I have argued to Your Honors that the Maine Company did not unreasonably accumulate, and that Your Honors should change that language and should give me mine.

I now go to the last finding of all, and I ask that that be changed. I approach that from this point of view: If I fail to convince you on the mere holding company point, and if I fail to convince you on the reasonableness of the accumulation, what have I then done? I have then left the case with two presumptions present. I don't at all say that I should be in that position. I don't think either presumption is in the case; but assuming I fail to move you,

what is the result? The result is that as you approached the decision, there were two presumptions that arose, one from mere holding, and one from unreasonable accumulation. But the presumptions were there only momentarily. They disappeared when evidence was put in. And the case was entitled to be considered and in the end, the Board did consider the case free of presumptions.

The law about the disappearance of presumptions I think is so clear I need scarcely state it, but I would like to call attention to two cases. One is *New York Life Insurance Company v. Gamer*, 303 U. S. 161, and I am calling attention to portions of the opinion that appear on pages 170 and 172. I choose this case because it is a Supreme Court case. It deals, however, with a presumption different from the one we are dealing with here, but one of equal validity. That was a case where a man obviously died from accidental means. The beneficiary of an insurance policy brought suit against the insurance company and there was a fight between the plaintiff and the defendant about a presumption. The presumption there involved was the ancient presumption, one of the most well-founded in law, and that is that, granting a violent and accidental death, the presumption is that a man died from natural causes, that is to say that always the courts will say they will not presume that a man committed suicide. For once and for all, the Supreme Court did away with the idea that the presumption had any validity left after evidence was introduced. And I would like to read a paragraph from the opinion:

> "Upon the fact of violent death without more, the presumption, i.e., the applicable rule of law, required the inference of death by accident rather than by suicide. As the case stood on the pleadings, the law required judgment for plaintiff. It was not submitted

on pleadings but on pleadings and proof. In his charge the judge had to apply the law to the case as it then was. The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed."

More in point, because dealing with the actual case here involved—I mean, the actual point here involved—is the familiar case of the United Business Corporation. I think all of Your Honors know it by heart. The reference is 62 Federal (2d) at page 754, where Mr. Justice Hand said:

". . . but the test remains the state of mind itself, and the presumption does no more than make the taxpayer show his hand."

That is to say, when we came into the court room, when this petitioner came into the court room and showed its hand, the presumptions disappeared. And it was then the duty—and I must say the Board faced the duty—it was then the duty of the Board to deal with the case free of presumptions.

I have been going for some time; I would appreciate a very moderate recess.

Member Smith: Yes, certainly.

(Brief recess.)

Mr. Welch: If Your Honors please, I now reach the last section of my argument.

Unhappily, it comes when I am tired. I should like to suggest that I might have Mr. Clark's agreement and Your Honors' permission to edit what I say somewhat freely from this point on, before this transcript is printed, and

unless there is some objection to it, I would appreciate that agreement.

Mr. Clark: Oh, I see no objection to that, Your Honors.

Member Smith: No, there is no objection.

Mr. Welch: In view of what I last said, I think it is the law that when the taxpayer shows his hand and when the taxpayer develops, day after day, for two weeks, a record as was developed here, these presumptions do disappear.

I suggest that the last sentence appearing at the end of the paragraph, ending at the top of 41 B.T.A. 621, where the majority says, "and we think that the evidence has not overcome the presumption" is inadvertently inaccurate. I do not think the taxpayer had the burden of overcoming the presumptions. The presumptions had disappeared, and I think what the majority said was inadvertent.

I don't quarrel with it greatly because the Board did what it should do. It went ahead and considered the case free of presumptions. And it was not, in fact, until I reached that portion of the opinion that I began to read it with great eagerness and with great interest.

I now wish to deal with the opinion, beginning with the third paragraph on page 621 of the opinion and that is at the paragraph beginning with these words:

> "Even without the benefits of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose."

As I have said to Your Honors, I have read that paragraph and the following ones with the utmost interest. Here, at last, the majority was considering the case, as under the law I think it must consider it, that is, free of presumptions.

May I read that paragraph?

"Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose. The bare recital of the undisputed facts relating to the organization of the petitioner, the balance sheets, the source of earnings, the nature of the investments, the large accumulations of cash and surplus, the loans of cash and securities to the petitioner's sole stockholder, and the continued reinvestment of its gains and profits in securities, present, in our opinion, a situation typical of situations which Congress intended to cover by section 104 of the Revenue Acts of 1928 and 1932."

If Your Honors please, I am in a somewhat ungracious position at the moment. It is my unhappy duty to say that I think that paragraph is really full of error. May I read it, clause by clause, and explain to Your Honors why I feel that way?

The clause says, "Even without the benefit of the statutory presumptions, we think" and so forth; and then begins "The bare recital of the undisputed facts relating to the organization of the petitioner."

If Your Honors please, how can the facts about the organization of the petitioner reveal this nefarious intent? The petitioner was organized in 1911, before an income tax was ever heard of, or, indeed, before there was a constitutional amendment that permitted one. I had supposed the strongest fact I had on my side of the case was the fact that the petitioner was organized as it was and when it was.

The next clause, "the balance sheets"—

Balance sheets show assets and liabilities. What do they reveal about actual intent, actual purpose? The most

that Mr. Clark could do with a balance sheet would be to make an argument that a company's assets exceeded its liabilities. But if he made that argument, he would only tend to show that the corporation had accumulated, and would only get himself back into the presumptive field, which Your Honors have just promised you would leave behind.

"The source of earnings"—What does the source of earnings reveal about the actual purpose of the Maine Company? As the Government attorney points to the source of earnings, what comfort can he get out of that, except to show that the petitioner was a holding company, and that the source of its earnings was held securities?

And if he did that, he would only put the case back into the presumptive field, the presumption following from its being a holding company.

"The nature of the investments"—And once again, do they reveal anything about actual purpose of human beings? No. Nature of investments would only show, again, a holding company situation, once again the presumptive field which the majority has left in this section of its opinion.

The next clause is "the large accumulations of cash and surplus"—And that, I take it, is only once again to give Mr. Clark the opportunity to argue that the company had unreasonably accumulated, from which he would seek to raise a presumption, a presumption now left behind.

"The loans of cash and securities to the petitioner's sole stockholder"—And here I agree the Board or the majority has said something that under the cases has something to do with actual intent, and with that I will deal later.

And one more, "the continued reinvestment of its gains and profits in securities," which, once again, is only to point out that the petitioner is a holding company, and once again to put us back into the presumptive field.

All these things, says the Board, or the majority "present, in our opinion, a situation typical of situations which Congress intended to cover by section 104."

Now, may I at this point skip one paragraph and call Your Honors' attention to the fifth paragraph on page 624 of the majority opinion.

> "The petitioner was the means by which Prince had succeeded in accumulating up to 1929 a personal fortune of between $15,000,000 and $20,000,000 practically immune from taxation; for the income of the petitioner consisted almost exclusively of dividends received from domestic corporations which were a legal deduction from its own gross income. The result was that the petitioner had in many years no taxable income, and in other years only a small taxable income."

And may I link with that paragraph the fourth paragraph on page 620 of the opinion at which Your Honors are looking, reading:

> "Under his program Prince, through the instrumentality of the petitioner, would own in 1940 all of the assets of the Jersey Company and its subsidiaries, of a value of more than $60,000,000, free of debt."

I think, if Your Honors please, that the two paragraphs which I last have read, present what in the first paragraph that I read the Board considers a typical situation which Congress intended to cover by section 104. What the two last paragraphs seem to me to say is this; it seems to me that the majority says, "Well, Mr. Prince under this program is just getting too rich and is paying too little taxes."

I think in some way the Board senses this feeling that Mr. Prince did not bear the equitable share of the tax burden that a man should bear. To put it in the language of a man on the street, I think the Board feels that when Mr.

Prince, as the majority thinks, got so rich and paid so little, I think the majority feels, "There ought to be a law against that." That is the common reaction of the people on the street when they see a situation that for some reason or other they don't like.

Now, if Your Honors please, beginning in 1934, there was a law against that. That is the personal holding company law. That is a law against that. But since that law was not available in the years herein considered, I think the Board, the majority, with this feeling it had that Mr. Prince did not pay enough taxes, first felt there ought to be a law against that, and then felt, "Well, 104 must be a law against that."

And I think that the majority has applied 104 against this petitioner as if 104 equalled the personal holding company tax.

What makes me say that is this: There is no dispute between the gentlemen who sit at that table and us who sit at this table on this proposition, that, beginning in 1911 the Maine Company formed a purpose and that it unhesitatingly and undeviatingly followed that purpose straight through the years.

Now I wish to state that purpose with boldness. That purpose was, first, to acquire an equity position in the Jersey Company and ultimately to own the assets of that company free and clear.

I state that with boldness. And that purpose of the Maine Company continued unchanged throughout the years.

Now, 104, if Your Honors please, does not tax a situation, to use the wording of the majority opinion. The Personal Holding Company Act does. That is to say, the Personal Holding Company Act says, "If you have a closely held corporation and it accumulates, the tax is imposed."

That is just all there is to it; that is the situation.

However, 104 says something entirely different. In 104 you may have a closely held corporation. You may have a mere holding company, if you please. It may accumulate. But that corporation is not subject to this tax unless it has an actual intent to avoid surtaxes on its shareholders.

It must be conducted with a purpose to avoid taxes. To put it in the vernacular, the corporation must be run with the dominant idea of cheating the Government out of surtaxes.

Now, this company, I cannot point out too often or too strongly to Your Honors, was formed long before there was a tax, and long before 104 was ever heard of. Its purpose was formed, and that purpose was steadily adhered to through the years.

I say to Your Honors that Congress, if it wished, could tax a situation, and it did so, in the personal holding company tax. But there is one thing that Congress cannot do and that is it cannot change men's minds.

If Mr. Prince's purpose in running the Maine Company was to continue unbroken, straight through the years, no act of Congress could change that intent.

It used to be the law until this case was decided—meaning the case at bar—that if a corporation were not formed for the purpose of and had a history of being run without the purpose of cheating the Government out of surtax, it used to be the law that such a corporation had to make an abrupt change in its corporate purposes before it came under section 104. I like the way it was put in the Spitzner case which appears in 37 U.S. Board of Tax Appeals Reports, page 517, and I am reading from page 519. Speaking of a corporation which started out with an ordinary business purpose and traveled along in that way, the Board said:

> "However, the stockholders of that kind of a corporation might bring their corporation under the lash

of section 104 by diverting it from its normal business activities and intentionally using it during any taxable year for the purpose of preventing the imposition of surtax upon themselves through the medium of permitting its gains and profits to accumulate instead of being divided."

That is to say, until this case was decided, it used to be the law in this room, and in the Board, that if you had a corporation which started with an ordinary, a proper, business purpose, and there was no evidence of any change in that purpose, such a corporation is not affected by this Act.

Now, what has the majority done? It has done this: It has taken a corporation that never changed its purpose, that pursued this undeviating policy of investing more and more in the Jersey Company with a view, as I have said openly and boldly, first to acquire an equity ownership in it and ultimately to own it all. The Board has taken that corporation, which never changed its purpose, which always conducted its business in precisely the same way, and has said:

"We simply declare that its purpose was changed. We simply declare that 104 equals the personal holding company tax and we feel so deeply that there is something wrong in a tax situation that will let a man accumulate what we think is so large a fortune as we think Mr. Prince has, without paying any more than he did along the way, that we are simply going to say we don't care what your purpose was; we are going to say we are going to tax that situation."

And the situation, as I have pointed out, is this situation: The situation of a man, as the Board believes, having become rich and having paid too little along the way.

And there is something worse than that about it. When

the Board decides to impose this tax precisely as the personal holding company tax is imposed, the Board imposes this savage tax without the consideration Congress permitted taxpayers in the personal holding company tax. That is to say, in the personal holding company tax, Congress said, "We will permit any company to accumulate its earnings to meet existing debts, and accumulate them out of income, and we will not tax them."

And the Board, when it makes 104 equal to the personal holding company tax, as I suggest it does in this case, and puts on this savage tax, it doesn't even give the taxpayer the treatment accorded to it by the Personal Holding Company Act and allow it to accumulate out of earnings to discharge existing debts.

When this case was tried, day after day we demonstrated to the member who heard it, the purpose of the Maine Company, as I have indicated to Your Honors, and he became convinced, as in the end the majority as well became convinced, that the purpose was a single, undeviating purpose.

And I remember a most acute question asked of Mr. Clark, by Mr. Sternhagen. And had I the power I would ask him now.

Mr. Sternhagen, in this room, said to Mr. Clark, in substance:

> "This company started out sinless; it ran along sinless. Tell me, when did its purpose change? When did it become this sinister, sinful device used only to escape surtaxes?"

And Mr. Clark made the most astonishing answer*, and

*The reference is to page 1161 of the transcript of the hearing where the following appears:

"The Member: You dealt with the question that it was admitted that it was not formed for the purpose stated in 1911. I would like to know whether, since the Government, as I understand it, does contend that this corporation was during the taxable years availed of for the purpose as set

I wonder if he would make it today. He looked at the Member and said, "I think the purpose changed when the first loan was made to Prince."

The first loan was made to Mr. Prince in 1911. The only suggestion as to when there was a change from an ordinary business purpose to a sinister purpose, was the suggestion that it changed when the first loan was made, and that was in 1911, when it was totally impossible for anybody to have a sinister purpose in escaping taxes.

This tax gets imposed on this taxpayer in a section of the majority's opinion in which it says it is dealing with the case free of presumption. But in imposing the tax, the Board makes the most violent presumption. It presumes that the intent with which the petitioner was run actually changed when there wasn't any evidence whatever that it did change, and when, as we now know, and everybody agrees, minority and majority alike, that the purpose all through was the purpose of coming to be the owner of the Jersey Company and to free that company of its incubus of debt when 1940 arrived.

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forth in subdivision (a),—I would like to know whether the Government has formed an opinion as to when the purpose—it says it was availed of in the taxable years here in question, came into its history since it was not formed for that purpose, that is to say, there must have been a time between the early years when it was formed for some other purpose and the taxable years when it is said to have been availed of for the condemned purpose, when the purpose changed so as to bring it within the statute. Did it change only in the taxable year 1930, or was it in the taxable year availed of, as it had been availed of for years before, and, if so, when?

"Mr. Clark: Well, I cannot point Your Honor to the precise year, but I would say unquestionably it was availed of prior to the taxable years, in this regard, at least—that is, loans to Mr. Prince, who was its stockholder during those years. That had been going on for years. I haven't the precise figures.

"The Member: Well, that answers my—that is, the earmark of the applicability of the term 'availed of' is the fact of loans made to its principal or sole shareholder, so that whenever that began the Government's position is that at that time there began the period when this corporation was availed of for the condemned purpose. Is that the idea?

"Mr. Clark: Yes, sir."

The first loan by the petitioner to Mr. Prince was made in 1911! Exhibit 8-65.

Now, I want to go fairly rapidly over the other paragraphs in the opinion.

I have skipped in the argument that I have made so far the paragraph on page 621, beginning, "It should be borne in mind that the petitioner was solely owned by Prince."

I wish to comment on that paragraph for two reasons—firstly, because it has to do with the National Grocery Company case, which I think any lawyer standing where I stand ought fairly to face.

But before I deal with the National Grocery Company case, I should like to point out the sentence:

> "It was of no moment to Prince whether the earnings of the petitioner were carried in his individual pocketbook or in his corporate pocketbook."

I assert, in view of the argument I have here made to Your Honors that it was of the greatest moment to Prince where these funds were kept. It is the law in this country, as I have stated earlier in my argument, that when the Maine Company took the earnings of this emasculated Jersey Company and left it helpless, to take care of itself, take care of its own fate, that a trust was imposed on every dollar the Maine Company took.

And had the Maine Company, in turn, passed that money on to Mr. Prince by way of dividend, in turn he would have become liable to the creditors of the Jersey Company and its preferred stockholders.

It is not accurate to say it was of no moment to Mr. Prince. Had he swept all this money out of the Maine Company as the majority seems to think he should have, he personally would have faced the suit in Boston that the Maine Company now faces about which I spoke a moment ago. But not only that. It was of plenty of moment to the

Jersey Company and to its creditors and stockholders, whether or not the money was kept in the Maine Company. It was of plenty of moment to the Maine bondholders whether or not the money stayed. And it was of plenty of moment to Mr. Prince's fellow directors if they allowed that money, impressed with this trust, as I have argued to Your Honors, to leave that company. All of them would have been personally liable.

Now for the National Grocery Company case. The situation here is not analogous to the National Grocery Company case, to the situation in that case. I wish to read the sentence from the Grocery case that is quoted in the opinion and to go back for a moment to the argument we had about it in this court room before:

> "Since Kohl was the sole owner of the corporation, the business would have been as well protected against unexpected demands for capital, and assured of capital for the purpose of any possible expansion by his personal ownership of the securities as by the corporation's owning them."

In the Grocery case, let it never be forgotten that there was no debt anywhere in the picture that had to be faced. In the case at bar let it never be forgotten that there were all these millions of debt in the Jersey Company that had to be faced.

The key to the Brandeis dictum, I respectfully suggest to Your Honors, is in the words "unexpected demands". Can there be any suggestion that the demand for capital in 1940, in this situation, was unexpected? Just as surely as the clock ticked, just as surely as you turned over the pages of the calendar, the time approached when there had to be funds to take care of the Jersey situation. It is beside the point to talk about unexpected demands for capital.

Member Opper: There, right at that point, Mr. Welch, isn't it true that the Jersey Company had tremendous assets, including, for instance, a railway lease from which it was getting two million dollars each year; and wouldn't those assets have been available for the payment of the bonds if there had ever been any need for them?

Mr. Welch: Certainly Your Honor has not forgotten my pointing out today how if the Jersey Company had been cast adrift, they would have been foreclosed on and been sold. Or if Your Honor thinks they should have been borrowed on in 1940, I trust you have not so quickly forgotten my argument that when 1940 came it was impossible for holding companies, such as Jersey and Maine, to borrow. The point is that the Maine Company was, in fact, a trustee for the Jersey creditors for whatever sums it took out of the Jersey Company.

If you wish to imagine that it had a right to gamble with its own future as to whether or not it could refinance Jersey in 1940, possibly it had that right. But in so far as it was the trustee of these huge funds which it had sucked up from this helpless company, it could not, as a trustee, gamble, when it was its duty to see the Jersey Company through.

Member Smith: Would you say the Jersey Company was in a worse condition in 1929 or 1933 than in 1915?

Mr. Welch: The point is that it had not been allowed in all that time to take care of its own bonds, with every nickel of its earnings sucked up to the Maine Company.

Member Smith: They were the earnings accrued subsequent to 1914.

Mr. Welch: In 1914 or 1915, probably what you say is applicable, the Jersey Company wasn't then a personal holding company as it became in 1934.

I think it would be fair to say back in 1914, or 1915, it

is reasonable to look forward to the Jersey Company borrowing on these huge assets in 1940. But when 1929 to 1933 came around, and we are in the depression we are in, I am only saying to you, can you brand the conduct of the Maine Company as unreasonable when it says, "I can't take a chance. This company is responsible for seeing the Jersey Company through. I am going to have the cash available. I am not going to be criticized by creditors, and I am not going to be criticized by preferred stockholders."

I don't say that, looking forward in 1929, it would have been insane to hope to borrow in 1940; as it ultimately turned out to be impossible. I only say, don't, on the other hand, brand the conduct of the Maine Company as insane or folly when it says, "We will be conservative and see that there is money in the enterprise to take care of these debts."

That is all we are talking about. Surely it can't be folly or insanity in the Maine Company to be cautious and conservative particularly when events prove that had it relied upon the borrowing capacity of the Jersey Company or even of itself, when 1940 came around, it would have been cruelly cheated of that possibility by the passage of the Personal Holding Company Act.

Member Smith: The Personal Holding Company Act is in the Act of 1934?

Mr. Welch: That is correct.

Member Smith: And that is after the years we are concerned with?

Mr. Welch: That is right. I am only pointing out to Your Honors if the Maine Company had expected to do some borrowing in 1940, by the cruel circumstances of the passage of the Act, that became practically impossible when the time came. I hope Your Honor sees that, and I hope you will understand with me that lenders just won't lend to a personal holding company nowadays. There is no hope of their

getting their money back. The personal holding company simply cannot accumulate for amortization, or anything else. And as I said in my argument, the only thing that can happen to a personal holding company borrower is that it can't go up, and may go down.

Member Opper: You have made that statement a number of times and I have wondered at it each time, and I am still wondering why it is you say this thing had become so impossible. You say they can't accumulate. You don't mean exactly that, do you?

Mr. Welch: Practically it comes to that. I have watched the officers of this company go around and approach insurance companies and banks and ask for loans, and I know, as a practical matter.

Member Opper: You are not suggesting there is anything in the Personal Holding Company Act or the personal holding company section that says it is illegal—

Mr. Welch: Oh, not at all.

Member Opper: —to use funds for the payment of indebtedness?

Mr. Welch: Oh, no. I am only telling Your Honor something I think you can see, and that is that when one of these companies goes and says, "Come and lend me money," they can't get it.

Member Opper: The bank says, "We have got to have the guarantee of your 80 percent stockholder, because you have got to declare this money out in dividends,"—isn't that what the bank says?

Mr. Welch: They won't touch it.

Member Opper: Of course, your experience with banks is something I am perfectly willing to accept on your statement. But when you place it on the basis of something we all know about; namely, a statutory provision, then it seems to me I have to have a little more explanation than just

the statement on your part that it is unlawful to accumulate earnings.

Mr. Welch: Well, I have no right to ask Your Honor to take what I say and make some decision in a case because of something I tell you about, myself, about trying to borrow money. Don't misunderstand me. I am only asking you to consider the possibility of either the Maine or Jersey borrowing, in the face of the Personal Holding Company Act. And just put yourselves—you know the law so beautifully—just put yourselves in the position of a possible lender, who sees that the company may go bust, and that no matter how prosperous it is, it has got to push out all of its earnings to its stockholders, or else give 75 percent of that to the Government.

Mr. Green says it is worse than that, that it is over 82½ percent today.

I am only suggesting that you think about the law and those things, as would a banker, if you will, and see if there isn't the utmost cogency in what I say to you.

The bankers just don't like it and don't want that kind of business.

Member Opper: Even with the guarantee of the stockholder, who is the same fellow that gets the money that otherwise the corporation would have in its treasury?

Mr. Welch: What I have said is still true and it is true because we are talking about long term financing, naturally. I think we are in perfect agreement, and you have got to have perfect agreement, and the thing is something that has got to be sold to the public.

Now, does anybody in the world have the slightest interest in the personal guarantee of a man named F. H. Prince, who is 80 years of age? Certainly nobody can imagine that guarantee being the sort of thing you can go out and sell securities on in the market. I only say to Your Honors, life

isn't like that. You can't sell in today's market the issue of a personal holding company.

I don't ask you to decide this case on my assertion, but I do have a right to ask you to consider the fact and see just how difficult, if not impossible, it is for a borrower ever to pay off, and then make up your own mind whether or not anybody will lend to that kind of a company.

Now, to go back for just a moment to Mr. Brandeis' dictum about unexpected demands for capital, will you think for a moment of this case?

Let us assume you have a machine tool company which in the year 1939 has a million dollars of profit. Let us assume that in December of 1939 it makes a contract by which it agrees to build and equip a plant in the following year, costing a million dollars. It happens this isn't a purely imaginary case. A case very much like it has come to my personal attention.

Does anyone think that Mr. Brandeis, himself, would require that machine tool company in December to push out its million dollars and then call upon its stockholders for a capital contribution in January to enable it to carry out its contract to build its building?

It is difficult for me to speak for Mr. Brandeis, but I just can't imagine his thinking there would be anything wrong with the corporation's retaining, over the 31st day of December, the million dollars which it has got to start spending to pay a contractor for a plant in the following January.

That example, it seems to me, shows again the importance of the words in Mr. Brandeis' opinion, "unexpected demands for capital."

In the Grocery Company case, there was no expected demand for capital. It was a case about which this dictum might reasonably have been spoken. In the case at bar

there was the most certain demand for capital. And so I say that dictum is certainly far from controlling in this case.

I now wish to call attention—and I have only two or three more paragraphs to call attention to—to call attention to the first paragraph on page 622, of the opinion.

That is the paragraph that was dealt with by Mr. Green in this court room when we last met here, and I think I need not refer again to that argument. I think it is fair to say that the upshot of that argument was that the feeling was on Your Honors' side of the bench, as we felt on this side, that that particular paragraph has no place in this opinion.

Now, the paragraphs that are second, third and fourth on page 622 deal with the loans to Mr. Prince. As I pointed out, when I discussed the first paragraph as to what the Board had to say when it began to consider the case free of presumptions, what it said in that paragraph about loans to stockholders is in order.

If a stockholder in a corporation like this one takes down from his corporation money in the guise of a loan instead of in dividends, and uses the money for his own purposes, to eat and drink and run a yacht on, and have a gay time, I am quick to agree that that is some evidence of the nefarious purpose. The loans, however, in this case, were in no sense of that character. The evidence about them is clear and undisputed.

There was one tiny loan, tiny on the scale on which we are here dealing, from the Maine Company to Mr. Prince for a personal purpose, and that was the loan of $160,000 to buy his Newport house, a loan made temporarily only, until he could sell his Boston house. All the other loans had nothing to do with making Mr. Prince better fed or better clothed or having a longer ride in his yacht. In every in-

stance the situation was one in which the Maine Company wished to see some end accomplished that could not be accomplished by itself, and where the intervention of an individual was necessary. The money could just as well have gone to somebody other than Mr. Prince, so long as that person held an equally important position in the financial world, and every end that the Maine Company sought to achieve through the loan could have been achieved.

The loans to Mr. Prince, both of cash and securities, as the record clearly shows—and there is no dispute about it—were in no sense made as a substitute for dividends.

Mr. Sternhagen is entirely correct about it. They had no significance in the usual sense, and there is no point in discussing those loans in this case. And, indeed, it is not in point to discuss the Grocery Company case which told about loans being taken down for the personal uses of the stockholder and as a disguise for dividends, which he really needed, but wouldn't take in the form of dividends, because he didn't want to pay the taxes.

That just isn't the situation here. If there had been five millions of dollars of loans to Mr. Prince for the reasons suggested in the Grocery Company case, this case wouldn't even have been tried. But there never was the slightest difficulty about those loans in the minds of anybody. We all knew, as the majority knew and as Mr. Sternhagen knows, they weren't the type of thing in any sense that has the significance of the loans in the Grocery Company case.

Now the paragraph beginning on page 622 of the opinion, which has to do with the year-end sales by Mr. Prince to the Maine Company. Tired and somewhat husky as I am, surely it is sufficient to point out to Your Honors that in the Farish and in the Trico cases it has now become the established law that those things have no significance and no place in this kind of a picture.

Two more things and I am done. When the Board reached this portion of its opinion, I would have been happier if the Board had considered what seems to me one of the most cogent bits of evidence on what the actual intent in this case was, and that evidence appears on the chalk that I handed to Your Honors this morning in connection with my request for an additional finding of fact under 18 (see p. 22 of this record). It is the one on the single sheet heavily covered with figures.

I am so near to being done, that Mr. Green is so kind as to say he will make this segment of my argument, and I will take up what else I will say.

Mr. Green: I think all Mr. Welch wants me to deal with and all I propose to deal with are the figures which are the foundation of his argument. If you will look at finding No. 26, which appears upon page 602 of the cited copy of the opinion and on page 13 of the pamphlet copy, you will see that in 1933, that there is a table showing—about in the middle of page 602—the net earnings of the Maine Company for all the years involved in this case, the dividends paid and the excess of net earnings.

That table shows that in 1933 the Maine Company had net earnings of $2,243,000 and paid dividends of $400,000, leaving an excess of $1,843,000—and that excess, of course, is the amount upon which the tax in this case is based. I think we are all familiar with the source of those earnings. Those earnings were the monies that the Maine Company had, as Mr. Welch expressed it, sucked up from the Transit Company and the Railway Company for the most part. All of the Transit and Railroad Company earnings were included in the composition of those earnings.

Now, if you will look again at finding 29, which appears on page 605 of the opinion in 41 Board of Tax Appeals and it appears on page 16 of the pamphlet opinion, right at the

bottom of that page in the cited opinion is shown the net income of the Transit Company for 1933, and the dividends it paid. The Transit Company in that year had a loss of over eight hundred thousand dollars, but nevertheless pushed up dividends which went into the pocket of the Maine Company in an amount of $1,716,000.

Again, if you will look at that part of finding 29 which deals with the earnings of the Produce Terminal for 1933. That is on page 606 of the cited opinion and on page 17 of the pamphlet copy. There it will be seen that in 1933 the Produce Terminal had an income of slightly less than thirty thousand dollars, but it nevertheless paid dividends directly to the Maine Company, which then owned all of its stock, of $200,000—or paid dividends $170,000 in excess of its earnings for the year.

Nobody could have been at all critical if the Transit Company had failed to pay any dividends for 1933. It had no income but, indeed, a loss of nearly a million dollars. And certainly no one could have been critical if the Produce Terminal had paid dividends of all its income, about thirty thousand dollars, instead of the $200,000 it did pay.

If the Transit Company had paid no dividends in 1933, and the Produce Terminal had paid only $30,000 instead of $200,000, the Maine Company's net earnings for 1933, instead of being $2,243,000 would have been less by $1,716,000 plus $200,000 minus $30,000, or less by $1,886,000. And if you do that subtraction, you find that the Maine Company's net earnings before it paid any dividends would have been $356,090. And it paid $400,000 in dividends that year.

In other words, if the Maine Company had taken no dividends from this Transit Company, which was losing money and had taken all of the earnings of the Produce Terminal for the year, instead of having an excess of earn-

ings, it would have paid out in dividends some $44,000 more than its earnings.

Mr. Welch: Thank you, Mr. Green.

I am grateful to Mr. Green for making those figures so clear, because they seem to me so cogent.

We are now in a year in which the majority by hypothesis says, "The Maine Company is no longer run as an honest, ordinary business concern. Its purpose has now changed. Its dominant purpose now is the purpose to cheat the government out of surtaxes on Mr. Prince." Let us not forget that. In that year it is implicit in the Board's decision that the Maine Company is now run for the dominant purpose of saving Mr. Prince income tax. Now think for a moment, if that is its purpose, if that is the way it is being run in that year, can anyone this side of Heaven tell me why it should have sucked up from the underlying companies that huge sum of money and laid itself open to this tax?

If the Maine Company is run with the purpose of saving Mr. Prince surtaxes, as the majority says it was, wouldn't the Maine Company, with that dominant purpose in mind, telephone Chicago and say, "Sh-h-h, Boys; don't send up any dividend this year. We don't want to pay surtaxes." And telephone Produce Terminal, "Lay off the dividend this year, Boys. I am running this corporation this year to save surtaxes. Don't send up any dividends."

It seems to me so cogent I can't see how the Board could possibly overlook it or fail to see the significance of it. If the Maine Company is being run for the nefarious purpose in the year 1933, what possible explanation can there be for its sucking up those dividends which were not in fact earned in that year? If that was its purpose, it could have accomplished it so simply and without the need of any lawsuit. It could have simply erased any dividends in that year.

And to me, in that connection, it was of some cogency that Mr. Prince testified on pages 421 and 422 of the record that it was always his policy to suck money up into the Maine Company, and indeed it was his policy.

On the chalk that is before Your Honors for the years 1922 through 1933 (See this record p. 22), if you will examine it, you will find, I think, that in seven years out of the group more was sucked up than was actually earned, and in only five years was less sucked up than was actually earned.

How can it be said that the purpose of this corporation had now changed, that it was no longer an honest business concern plowing the straight furrow I have pointed out? How can it now be said it had merely become a creature, a device used to escape surtaxes? Its conduct simply is not consistent with that suggestion.

Before I close, just one more thing. When I was last in this court room, I learned to my delight that there is no difference now between the minority and the majority on this one fundamental point. Both the minority and the majority believe that the actual purpose for which this petitioner accumulated its funds was that of liquidating the Jersey Company in 1940. When I discovered that, I will say frankly that I thought then it meant the end of this case. I firmly believe the law to be that any purpose honestly held and adhered to, and motivating the conduct of a corporation for over a quarter of a century, makes 104 just as inapplicable as if it were written in Chinese. Further study, though, convinced me that there are at least some Members of this Board who insist that the actual purpose must be a purpose within the reasonable needs of the corporation which so accumulates; and those Members, as I understand

them, believe that the reasonable need must exceed in degree and force those needs by which ordinary businessmen govern their conduct.

Those Members, it seems to me, require that the necessity for the accumulation must be actually a legal necessity. But even that necessity I trust my argument today has now supplied. I am convinced that if those Members to whom I now address my remarks will study the so-called by-pass agreement, Exhibit S-46, and if those Members will read the cases I have referred to, they will reach the conclusion that the Maine Company had no choice in the matter. It was legally forced to protect the Jersey creditors, and protect the Jersey stockholders. And as the years went by and it stripped the Jersey Company and the operating companies of all the funds with which they could hope to meet their own debts, a certain and a compelling duty devolved upon the Maine Company to protect those companies, and a charge on every dollar taken from them was legally fastened on those funds in the Maine Company's treasury. And in the end when the liquidation of the Jersey Company came, as appears in the affidavit of Mr. McDonough filed with this Board, let it be said the Maine Company performed that legal duty with meticulous care.

This case, may it please Your Honors, is now in this position: The actual purpose, the real purpose for which the Maine Company accumulated its funds, is recognized and admitted by everyone, minority and majority alike, to have been the purpose of liquidating the Jersey Company.* That

* Reference is made to the Record of the hearing on July 18, 1940, p. 88:—
"Member Smith: I might state at this point that I never had any doubt from the testimony in this case, that Mr. Prince and the others in authority here had an expectation all during the years 1920 to 1933 inclusive, to liquidate the Jersey Company. I think that the testimony warrants that,

admission seems to me decisive of this case but for such Members of the Board as feel that that purpose must be authenticated, so to speak, by a legal duty to accumulate, my argument if carefully and, may I say, sympathetically considered, will, I think, supply that authentication. And I therefore urge, and urge in the conviction that I am wholly right, that the last three findings of the Board be stricken; that the findings as suggested by me be substituted and be made the majority findings of the Board.

Member Smith: Mr. Welch, do I understand that your remarks on this motion that we are considering cover also the "Motion for Further Hearing?"

Mr. Welch: They have to, because I have been forced to argue the case as a whole on the last three points.

Mr. Clark: I have nothing to add, Your Honor, unless it is possible Mr. Pierson may have something to say relative to the figures Mr. Green referred to. I don't know whether he has or not. I haven't gone into that phase of the case.

Mr. Pierson: In that connection, if Your Honors please, I think in choosing, in taking one year as an example where the dividends are paid in excess of the earnings, there again it does not give the clear picture. You have also, in the last column, with respect to the Transit Com-

bet was not the basis of any conclusion that I reached. If any member of the Board reached a contrary conclusion from any statement made in the opinion, why it should be corrected, of course."

and again at p. 89:—

"Member Smith: I could not find from the record any evidence that the Maine Corporation had any purpose except the purpose of Prince, and the company could not have, the corporation can't have a purpose except the purpose of its officers or directors, and I have no doubt that Prince had the idea. I think it was plain all through this testimony, that it was his idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares to pay off not only all of the bonds of the Jersey Company in or before 1940 but all of the indebtedness of all of the other corporations."

pany, the Produce Terminal Company and Railway Company, and other companies stated at pages 16 and 17 (41 B.T.A. 605, 606) of the opinion, included the earned surplus, which shows a large accumulation of earnings in these years, especially one of which being in the year 1932 immediately preceding; in that year there was an accumulation of net income in the Transit Company of $3,617,984.99, of which only $1,843,372.44 were distributed. That is, in choosing one particular year to show that a dividend was paid in excess of the earnings for that year, to me it indicates no particular point unless we look at the picture of all the years and see how much the corporations have accumulated in their surplus during the years and how much they have in the surplus to distribute as dividends.

Member Smith: That concludes the hearing?

Mr. Welch: May I say that it is my intention, as on the last hearing, to have the record printed and distributed to all Members of the Board.

Member Smith: Very well.

(Whereupon, at 4:30 p. m., the hearing of the above-entitled matter was concluded.)

[Title omitted.]

ORDER.

[Dated January 25, 1941.]

The petitioner filed the following motions relative to the Board's findings of fact and opinion in the above-entitled proceeding published at 41 B. T. A. 590: "Motion to Modify Findings of Fact and for Additional Findings of Fact" and "Motion for Further Hearing." Oral argument was heard thereon before a Division of the Board consisting of Members Kern, Opper, and Smith. Due consideration having been given thereto, it is ordered that the Board's findings of fact be supplemented as follows:

Add to finding numbered 34 the following:

"All of the securities sold by F. H. Prince & Co. to the petitioner in 1930, 1932, and 1933 were marketable securities and were sold to the petitioner at market price."

Add to the findings of fact the following:

"47. During the years 1922 to 1933, inclusive, the petitioner withdrew from the Jersey Co. and its subsidiaries in dividends more than the net earnings of the Jersey Co. and its subsidiaries for that period available for distribution to the petitioner."

"48. The signed stipulation of facts, together with exhibits S-1 to S-69, inclusive, attached thereto, are made a part of our findings."

and that the motions be otherwise denied.

Reviewed by the Board.

(Signed) CHARLES P. SMITH, *Member.*

[SEAL.]

STERNHAGEN, VAN FOSSAN, MURDOCK, LEECH, and KERN dissent.

[Title omitted.]

ORDER.

[Dated February 11, 1941.]

Under date of January 25, 1941, the Board entered an order in the above-entitled proceeding modifying its findings of fact as therein indicated.

Under date of April 5, 1940, the respondent filed his computation for entry of decision based upon the Board's report promulgated March 20, 1940. It is ordered that the parties file recomputations of deficiencies for the years 1930, 1932, and 1933, if such are necessary, in accordance with the Board's report promulgated March 20, 1940, as amended by its order entered January 25, 1941, on or before March 12, 1941, at which time hearing will be had thereon.

(Signed) CHARLES P. SMITH, *Member*

[SEAL.]

[Title omitted.]

MOTION FOR SPECIAL RULE.

[Filed March 1, 1941.]

Now comes the petitioner and moves that the Board, either prior to or as a part of its decision on computation under Rule 50, issue a rule as follows:

The Board's findings of facts and opinion, as amended, having held petitioner liable for the tax imposed by section 104 of the revenue acts of 1928 and 1932 for the years 1930, 1932 and 1933; it is held:

(a) Such tax for the years 1930, 1932 and 1933 be-

came liabilities of petitioner as at the close of each of the respective taxable years; as to which and upon non-payment, interest at 6% per annum became also a liability of petitioner; and

(b) The record in this case already showing that the books and income tax returns were on the accrual basis, liability for such interest upon said unpaid taxes was properly accruable at the close of each year following the year involved, as a deduction from gross income under section 23(b) in determining net income under section 21 and section 104(c).

REASONS FOR MOTION.

The Board's final report as amended were subsequent to rehearing held October 1, 1940. Subsequent thereto, *to wit*, on December 18, 1940, the Board promulgated its decision in *Floyd's, Inc.*, 43 B. T. A. No. 16, docket No. 99,562, and the Commissioner within the past few days, as petitioner is informed and verily believes, has acquiesced therein. This decision holds that the section 104 tax for the year 1930 was ascertainable at the close of the year involved, that provision therefor was properly made in years prior to that of final determination by litigation; that termination of litigation does not create the liability; and that, all of the facts necessary to determine section 104 liability having been ascertainable at the close of the year involved, the tax was at that time a liability for debt.

Petitioner now for the first time faces the situation where it may be ruled, here or elsewhere, that *Floyd's, Inc.*, either invalidates or otherwise highly questions G. C. M. 9575 (X-1 C. B. 381) and, should the Board be affirmed on review, its rights to such accruals prejudiced on the ground of separate issue not timely raised before the Board. To forfend against such contingency or revocation or alteration,

it is asked that the Board on the record as it stands, make the ruling in advance of its order under Rule 50.

Respectfully submitted,

WARREN W. GRIMES,
Shoreham Building,
Washington, D. C.,
Of Counsel for Petitioner.

[Title omitted.]

PETITIONER'S COMPUTATION FOR ENTRY OF DECISION.

[Filed March 6, 1941.]

The attached proposed computation is submitted, on behalf of the Petitioner, to the United States Board of Tax Appeals, in compliance with its Opinion determining the issues in this proceeding.

This computation is submitted in accordance with the Opinion of the Board, without prejudice to the Petitioner's right to contest the correctness of the decision entered herein by the Board, pursuant to the statutes in such cases made and provided.

JOSEPH K. MOYER,
1343 H St., N. W.
Washington, D. C.

WARREN W. GRIMES,
Shoreham Building,
Washington, D. C.
Of Counsel for Petitioner.

STATEMENT.

Petitioner's Recomputation

In re: Chicago Stock Yards Company,
B. T. A. Docket No. 83797.

INCOME TAX LIABILITY

Years	Tax Liability	Tax Assessed	Deficiency
1930	$1,910,467.38	$ 92,781.28	$1,817,686.10
1932	1,095,285.40	13,496.47	1,081,788.93
1933	1,066,789.38	12,963.21	1,053,711.41
Total	$4,072,542.16	$119,240.96	$3,953,186.44

Year Ended December 31, 1930.

Schedule 1 Adjustments to Net Income.

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)		$1,286,536.44
Net income as determined under Board of Tax Appeals decision promulgated March 20, 1940 (Section 21)		$1,286,536.44
Net income, deficiency notice (Section 104 (c))		3,512,166.03
Net income, Board of Tax Appeals decision (Section 104(c))		$3,512,166.03

Explanations of Changes.

The United States Board of Tax Appeals in a decision promulgated March 20, 1940, sustained the Commissioner for the year 1930.

Schedule 2 Computation of Tax.

Net income, Schedule 1 (Section 21)	$1,286,536.44	
Tax at 12% (Section 13)		$ 154,384.37
Net income, Schedule 1 (Section 104 (c))	$3,512,166.03	
Tax at 50% (Section 104(c))		1,756,083.01
Total tax liability		$1,910,467.38
Total previously assessed:		
Account #401545		92,781.28
Deficiency		$1,817,686.10

Year Ended December 31, 1932.

Schedule 3 Adjustments to Net Income.

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)		$ 310,679.56
Net loss as redetermined under Rule 50 of the U. S. Board of Tax Appeals, as a result of its decision promulgated March 20, 1940 (Section 21)		(43,583.64)
Net adjustment as computed below		$ 354,263.20
Net income, deficiency notice (Section 104(c))		$2,544,834.00
Net income, as redetermined under Rule 50 of the U. S. Board of Tax Appeals, as a result of its decision promulgated March 20, 1940 (Section 104(c))		2,190,570.80
Net adjustment as computed below		$ 354,263.20
Nontaxable income and additional deductions:		
(a) Loss on sale of stock	$221,202.03	
(b) Assessment on shares of stock	24,000.00	
(c) Interest accrued on 1930 deficiency tax (Schedule 2 hereinabove) of $1,817,086.10 for the year 1932	109,061.17	
Net adjustment as above	$354,263.20	

Explanation of Items.

(a) In accordance with a stipulation filed with the United States Board of Tax Appeals the petitioner is entitled to deduct a loss of $221,202.03 in 1932 on the sale of 3,050 shares of the Stock Yards National Bank and 240 shares of the Central Manufacturing District Bank to F. H. Prince and Company, Incorporated.

(b) It is stipulated that the petitioner is entitled for 1932 to a deduction not claimed on its return of $24,000.00 paid as an assessment made by the banking authorities of the

State of Illinois against 240 shares of the Central Manufacturing District Bank owned by the petitioner.

(c) The taxpayer's books of account are kept on the accrual basis, its income tax return was filed on that basis and its income tax liability was computed in accordance therewith. The Board of Tax Appeals' decision of March 20, 1940, and Orders of September 21, 1940 and January 25, 1941, redetermine the deficiency for the calendar year 1930 in the amount of $1,817,686.10. On the basis of the Board's redetermination, the deficiency tax became a liability on December 31, 1930, due and payable on March 15, 1931, from which latter date interest at the rate of 6% accrued.

Therefore, on December 31, 1932, interest had accrued on the deficiency of $1,817,686.10 for the year 1932 in the amount of $109,061.17, which is an allowable deduction from gross income (Section 23 (b) of the Internal Revenue Code) in redetermining the net income under Section 21 and Section 104 (c).

Schedule 4 Computation of Tax.

Net loss, Schedule 3 (Section 21)		$43,583.64
Tax at 13¾% (Section 13)		None
Net income, Schedule 3 (Section 104(c))	$2,190,570.80	
Tax at 50% (Section 104(c))		$1,095,285.40
Total tax liability		$1,095,285.40
Total previously assessed, Account #401883		13,496.47
Deficiency		$1,081,788.93

Year Ended December 31, 1933.

Schedule 5 Adjustments to Net Income.

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)	$95,324.01

Net loss as redetermined under Rule 50 of the U. S. Board of Tax Appeals, as a result of its decision promulgated March 20, 1940 (Section 21)		(65,262.91)
Net adjustment as computed below		$ 160,586.92
Net income, deficiency notice (Section 104(c))		$2,293,936.16
Net income, as redetermined under Rule 50 of the U. S. Board of Tax Appeals, as a result of its decision promulgated March 20, 1940 (Section 104(c))		2,133,349.24
Net adjustment as computed below		$ 160,586.92
Nontaxable income and additional adjustments:		
(a) Interest accrued on deficiency tax (Schedule 2 hereinabove) of $1,817,686.10 for 1930, for the year 1933 at 6% per annum: $1,817,686.10 @ 6%	$ 109,061.17	
(b) Interest accrued on deficiency tax (Schedule 4 hereinabove) for 1932 of $1,081,788.93 for the period March 15, 1933 to December 31, 1933 ($1,081,788.93 for nine months, 16 days @ 6%)	51,525.75	
Net adjustment as above		$ 160,586.92

Explanation of Items.

(a) The taxpayer's books of account are kept on the accrual basis; its income tax return was filed on that basis and its income tax liability was computed in accordance therewith. The Board of Tax Appeals' decision of March 20, 1940, and Orders of September 21, 1940, and January 25, 1941, redetermine the deficiency for the calendar year in the amount of $1,817,686.10. On the basis of the Board's redetermination, the deficiency tax for 1930 became a liabil-

ity on December 31, 1930. Since such deficiency accordingly became due and payable on March 15, 1931, and was not thereupon paid, interest accrued thereon at the rate of 6% per annum amounting to $109,061.17 for the calendar year 1933.

(b) The recomputed deficiency for the year 1932 is $1,081,788.93 (Schedule 4 hereinabove) which became a liability on December 31, 1932, on which interest accrued in 1933 from March 15, 1933, to December 31, 1933, at 6% per annum. The interest for nine months, sixteen days amounts to $51,525.75, which is an allowable deduction from gross income in arriving at the net income under Section 21 and Section 104(c).

Schedule 6 Computation of Tax.

Net loss, Schedule 5 (Section 21)	($65,262.91)	
Tax at 13¾% (Section 13)		None
Net income, Schedule 5 (Section 104(c))	$2,133,349.24	
Tax at 50% (Section 104(c))		$1,066,674.62
Total tax liability		$1,066,674.62
Tax previously assessed: Account #401650		12,963.21
Deficiency		$1,053,711.41

[Title omitted.]

ORDER.

[Dated March 7, 1941.]

On March 1, 1941, the petitioner filed with this Board a "Motion for Special Rule." The motion reads in material part as follows:

> "Now comes the petitioner and moves that the Board, either prior to or as a part of its decision on computation under Rule 50, issue a rule as follows:
>
> The Board's findings of facts and opinion, as amended, having held petitioner liable for the tax imposed by section 104 of the revenue acts of 1928 and 1932 for the years 1930, 1932 and 1933; it is held:
>
> (a) Such tax for the years 1930, 1932 and 1933 became liabilities of petitioner as at the close of each of the respective taxable years; as to which and upon non-payment, interest at 6% per annum became also a liability of petitioner; and
>
> (b) The record in this case already showing that the books and income tax returns were on the accrual basis, liability for such interest upon said unpaid taxes was properly accruable at the close of each year following the year involved, as a deduction from gross income under section 23(b) in determining net income under section 21 and section 104(c)."

On March 4, 1941, petitioner filed with this Board a "Motion for Ruling Preliminary to Rule 50 Computation" which reads in material part as follows:

> "Now comes the petitioner and moves that the Board, on its findings of facts already made, rule that in computing net income under sections 23(b), 21 and 104(c),

the *petitioner and respective subsidiaries accrue*, as properly set aside in reserves and in the years already found, the amounts loaned or advanced for the relief of banks related to the enterprise and covered in Finding numbered 23 as follows:

1930		
Transit Company	$ 464,000.00	
Transit Company	100,000.00	$ 564,000.00
1932		
Petitioner	$ 327,307.55	
Petitioner	3,071,779.19	
Transit Company	1,340,000.00	
Produce Terminal	350,000.00	$5,089,086.74
1933		
Petitioner	$1,800,000.00	
Transit Company	1,016,414.84	
Transit Company	1,300,000.00	
Produce Terminal	300,000.00	
District	600,000.00	$5,016,414.84

and that these extraordinary, emergency, and unanticipated expenditures were outside the program of accumulating profits to provide for the 1940 liquidation of the Jersey Company." [Italics ours.]

This proceeding is before the Board for a recomputation of deficiencies for the years 1930, 1932, and 1933. New issues may not be injected into the case for the purpose of a recomputation under Rule 50 of the Board's Rules of Practice. See *Bankers' Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308. Accordingly, it is ordered that the motions of the petitioner be and the same are hereby denied.

CHARLES P. SMITH, *Member.*

[SEAL.]

[Title omitted.]

REPORTER'S MINUTES.

[Filed March 19, 1941.]

Hearing at Hearing Room No. 3, Internal Revenue Building, Washington, D. C., on Wednesday, the 12th day of March, 1941, at 10:45 o'clock A. M.

The above-entitled proceeding came on for hearing on this the 12th day of March, 1941, before the HONORABLE CHARLES P. SMITH, Member of the United States Board of Tax Appeals, at Washington, D. C., pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had, to-wit:

Appearances:

Warren W. Grimes, Esq. (Shoreham Building, Washington, D. C.),

Francis B. Keeney, Esq. (1310 Turks Head Bldg., Providence, Rhode Island),

Joseph N. Welch, Esq. (60 State Street, Boston, Mass.),

Joseph K. Moyer, Esq. (1343 H Street, N. W., Washington, D. C.),

J. Bond Smith, Esq. (Woodward Building, Washington, D. C.),

Appearing on behalf of Petitioner.

R. H. Transue, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

PROCEEDINGS.

The Clerk: Docket No. 83,797, Chicago Stock Yards Co. Please state your appearances for the record.

Mr. Grimes: Warren W. Grimes for petitioner.
Mr. Transue: R. H. Transue for respondent.
The Member: Mr. Grimes, you may proceed.

STATEMENT ON BEHALF OF THE PETITIONER.

Mr. Grimes: If Your Honor please, we are before the Board this morning in what normally is the last round of what has been undoubtedly a very protracted and difficult case.

Petitioner would like to direct attention to items of difference between the computations filed, respectively, by the respondent and the petitioner, but only on the basis of the Board's Findings, independent of any motions that have been filed or any action that has been taken on those motions.

These differences affect only the years 1932 and 1933, so that on the first year, 1930, there is no contest.

I would like to cover, in their order, the following points:

(1) That the Board must make a correct computation under the statutes;

(2) That any item covered by the Findings and not calling for additional evidence or argument, is includable properly in the recomputation;

(3) That the Board's Findings show that the accrual system was used;

(4) That the liability claimed herein is properly accruable;

(5) That there is no distinction in accounting between the tax involved and the interest on the tax unpaid;

(6) That it is the Board's duty to include the item of accrual of interest on unpaid tax; and finally,

(7) The subject of losses for 1932 and 1933 because of the bank situation.

The first item in the petitioner's computation, appearing on page 3 as Item (c), is as follows:

"The taxpayer's books of accounts are kept on the accrual basis, its income tax return was filed on that basis and its income tax liability was computed in accordance therewith. The Board of Tax Appeals' decision of March 20, 1940, and Orders of September 21, 1940 and January 25, 1941, redetermine the deficiency for the calendar year 1930 in the amount of $1,817,686.10. On the basis of the Board's redetermination, the deficiency tax became a liability on December 31, 1930, due and payable on March 15, 1931, from which latter date interest at the rate of 6 percent accrued.

"Therefore, on December 31, 1932, interest had accrued on the deficiency of $1,817,686.10, for the year 1932 in the amount of $109,061.17, which is an allowable deduction from gross income (Section 23(b) of the Internal Revenue Code) in redetermining the net income under Section 21 and Section 104(c)."

As to the year 1933, the same principle as to the year 1930 deficiency, plus:

"The recomputed deficiency for the year 1932 is $1,081,788.93 (Schedule 4 herein) which became a liability on December 31, 1932, on which interest accrued in 1933 from March 15, 1933 to December 31, 1933 at 6 percent per annum. The interest for nine months, sixteen days, amounts to $51,525.75, which is an allowable deduction from gross income in arriving at the net income under Section 21 and Section 104(c)."

For the years 1932 and 1933, Your Honor will remember that there are statutory net losses. Obviously that would

not affect the question of normal corporation tax, and just as obviously it will affect the question of Section 104 tax.

The Board's Findings show that the accrual basis was used. Attention is called to Finding 25 on page 13—that is, in the pamphlet form—Finding 27 on pages 13 and 14, and Finding 48, which is the blanket finding including as the Board's Findings all of the stipulation exhibits; particular attention being called to page 6 of Exhibit S-52.

Under the statutes, and under Rule 50 itself, the Board is given the duty of finding the correct deficiency, and of making a correct computation, using as the basis, admittedly, the findings and the opinion. In his duty the Board is governed specifically by certain statutes as to computations. Sections 41 and 43 of the Acts involved direct that computation of net income shall be made on the basis used in the books and the returns; and that deductions and credits shall be taken in the year "paid or accrued" or "paid or incurred"—I call Your Honor's particular attention to the use of the term "incurred"—according to the accounting method used.

The Regulations (Article 322 of Regulations 74) require that consistency as to income and deductions must be exercised.

No computation can properly be made of a deficiency under Section 104 unless there first is determined the net income under Section 21. Both of the computations now filed—that is, those filed by the Government as well as those filed by the petitioner—show items that were stipulated or have been found by the Board as deductions under Section 23, which section is the starting point, logically, for any computation under Section 104.

The interest accrual item claimed arises only out of the Board's findings, but the justification of the deduction and the exact amount thereof are ascertainable from the same

finding, without any further hearing, without any further evidence, and without any search by the Board, and under the plain duty of the Board to correctly, justly, and fairly deal with the parties while they are still before it, the petitioner here presents the item as a proper item in a recomputation proceeding.

I should like to refer to certain cases. First the case of *Bankers Pocahontas Coal*, 287 U. S. 308. I cannot see that this decision has any applicability to this case. Your Honor heard that case below. The issues there were, first, whether royalties were taxable income; and second, whether the depletion allowance adopted in a prior District Court suit was *res adjudicata*. After the Board's findings and opinion, and on the Rule 50 computation, the taxpayer for the first time made a claim that would have required additional evidence, and in fact tendered that evidence to support the claim, the tender being made during the recomputation proceedings. The Board rejected the evidence, and the Courts affirmed its action. A rehearing was really what was asked there, on a clearly new issue and one that easily could have been raised when the proceedings first started.

Compare this with our claim, which calls for no new evidence, but rests upon the Board's findings. We claim we are nearer the *Strother* case, which Your Honor will remember went to the Circuit Court of Appeals with the *Bankers Pocahontas* case, the *Bankers Pocahontas* case going to the Supreme Court, and the *Strother* case being remanded to take additional testimony, the Court holding that such a course was "just."

The present case, we feel, is much nearer the *Edison Securities* case, 78 Fed. (2d) 85, before the Circuit Court of Appeals for the Fourth Circuit. There, as the direct result of the Board's findings and opinion, a question arose for the first time as to the amount of the deficiency. After

the taxpayer had filed its Rule 50 computation, the Commissioner filed a motion claiming an increased deficiency. The Board denied the motion on the ground that such a claim must be asserted at or before hearing or rehearing, and that this stage had been passed when the motion was filed. The Circuit Court of Appeals held the claim could have been made even during the Rule 50 hearing, that the Board might well have acted upon its own motion, and that:

> "It cannot be doubted, in view of the purpose for which the Board was established and of the statute governing its procedure, that it has equal power to do full justice to the parties while they are still before it."

That case was remanded for further proceedings.

There the matter arose only after the Board's opinion. The Board's findings gave rise to it. Nevertheless, it cannot be doubted that it was susceptible of being raised as an issue from the start, and that additional evidence was required to support it.

So with our case. This item as to the accrual of interest arises as a matter of computation only because of the Board's findings. It could not have been raised properly as a separate issue at the time the petition was filed. Issues are framed in pleadings before this Board, in other than fraud cases, by asserting some such form as:

> "The Commissioner erred in doing thus and so, or in refusing or failing to do thus and so."

The only way we could have raised this point as an issue was to have alleged that the Commissioner erred in failing to allow us as a deduction under Section 23 the amount properly accruable due to an unpaid liability under Section 104, which liability itself we are denying and contesting as the main issue in this case before the Board. We would be

setting up and claiming a liability on one hand directly inconsistent with our major issue in the case.

In *Commissioner* v. *Sussman*, 102 Fed. (2d) 919, the issue was whether a certain transfer constituted a reorganization under the statutes. The issue as to valuation of the stock which changed hands during that transaction was attempted to be raised for the first time in the computation proceedings. The attempt was denied on the ground that it was a new issue, and the Circuit Court of Appeals for the Second Circuit affirmed the denial. The *Sussman* case refers to certain instances in which the Board is charged with having abused its discretion, particularly the *Edison Securities* case and the *Ray* case, 88 Fed. (2d) 891. It includes instances where the Board denied motions where evidence relied upon was not available before the Board's findings.

Hughes v. *Commissioner*, 104 Fed. (2d) 144, shows on its face that additional evidence would have been needed.

The *Ray* case, which has been referred to and which was before the Seventh Circuit, shows that the Board ruled income was received in 1928 rather than 1926, the issue being the year in which alleged income had been received. After the Board's findings, the Commissioner moved for an increase in the 1928 deficiency claimed, and the Board ruled that the motion was untimely. The Circuit Court of Appeals for the Seventh Circuit said:

> "There is no reason why the Board should not be as liberal in allowing amendments to claims as courts are in allowing amendments to pleadings. * * * The Commissioner was within the time thus fixed. * * * The hearing is not completed until these computations are made and approved by the Board."

That was the case in which the taxpayer claimed that a certain amount received was a gift, and the Government

claimed it was compensation for 1926 for services rendered. Remember the year; the Government was contending it was compensation for 1926. The Board ruled, although the Commissioner had not claimed it, that it was income for 1928, and the Circuit Court of Appeals said:

> "After the Board's decision, its inclusion in the 1928 income was a matter of computation under the Rules. It was not a new claim although allowed by the Board as part of the income for a year other than that claimed by the Commissioner."

That case was remanded to the Board to so proceed. The common sense of this is that because the findings fairly covered the item, it should be recognized in the computation proceeding.

In the case of *Richardson*, 39 B. T. A. 927, at page 936, it is said:

> "It is the duty of this Board to determine the correct deficiency in tax and do full justice to the parties."

citing *Edison Securities*. In that case the Board disallowed a 1934 deduction, because it already had granted that deduction for 1932, even though the Commissioner had not urged the 1934 disallowance.

I cite these cases to show where the Board, in its discretion and in its duty to do justice and exercise fairness, has gone beyond the claims of the parties even on the records.

Is this interest item accruable? If, at the close of the year, a debt is due, no one can seriously question that the accrual system demands that it be accrued. Certainly, if the debt has been incurred it must be accounted for.

The Section 104 tax not having been paid on the due date, interest at 6 percent thereon became as much and as

fully a debt as the tax itself, collectible at the same time and by the same machinery as the tax itself. It is impossible to intelligently distinguish between these two items as debts, and a debt, under the accrual system, must be accrued.

When did both of them become debts? The leading case, of course is *U. S.* v. *Anderson et al*, 269 U. S. 422, which, as Your Honor will remember, involved the question as to the proper year for deduction by way of accrual of munitions taxes during the year 1916, the taxes being payable in 1917, which latter year is the year the taxpayer claimed them as properly accruable and as deductible. The Commissioner contended they were accruable at the end of 1916, and in sustaining him the Supreme Court said:

> "In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. * * * In the economic and bookkeeping sense * * * the taxes had accrued."

I ask Your Honor to keep in mind our claim as to the absence of any distinction between the tax and the liability for interest on the unpaid tax as being debts and therefore equally accruable, wherever these cases refer to the tax liability.

Following the quotation just read from the *Anderson* case, it was so held in *Brooklyn Union Gas*, 22 B. T. A. 507, although the point as to liability for the tax still was in litigation. So it was in *Bartles-Scott Oil Co.*, 2 B. T. A. 16, though litigation already had started as to the validity of the assessment. So it was in *Uncasville Manufacturing Co.* 55 Fed. (2d) 893, the language of which I ask Your Honor

to consider in dealing with this interest as of December 31st, following the due date when the tax was unpaid:

"All the facts upon which calculation—"

(I accent "calculation")—

"depended had been fixed before the expiration of the year. * * * The computation was uncertain, but its basis was unchangeable; it was unknown, not unknowable, on December 31."

So it was in *Hoverty*, 20 B. T. A. 644.

The Member: What was the name of that case?

Mr. Grimes: *Hoverty*, H-o-v-e-r-t-y, 20 B. T. A. 644, holding that additional assessments of tax accrue at the time they would have accrued upon a correct original assessment.

So it was all the way back to *A.R.R.* 1153, I-2 C.B. 92. See also *I. T. 2500*, VIII-2 C.B. 103; and *I. T. 2972*, XV-1 C.B. 108.

So also it was in *U. S. v. Woodward*, 256 U. S. 632. So it was in *Continental Baking Co.*, 77 Fed. (2d) 119, from which the following is taken from the decision of the Circuit Court of Appeals of the District of Columbia, and I again ask Your Honor to keep in mind its applicability to the debt for interest as well as debt for tax:

"The amount and basis of the tax was fixed and easily ascertainable in the years involved. No element of contingency was involved.

"We think, therefore, that in cases of this character the status of the corporation during the taxable period which established the liability for the tax should control. The finding was based upon facts existing in 1925 which brought the case within the provisions of the act and regulations. It was then that the capital

stock tax accrued and the liability for the tax was dependent upon the question of fact as to whether the corporation was engaged in business during the taxable period."

And I am accenting this from the decision:

"These conditions were all present and complete in the year in issue and could have been determined by the Commissioner as readily at that time as in later years. Nothing occurred during the intervening period affecting the determination. All the facts existed which fixed the liability and determined the amount of tax in the year involved when the tax must be held to have accrued." *Brown*, 8 B. T. A. 112, which was acquiesced in.

"The word 'accrue,' under the accrual system, does not mean that the item is due in the sense of being then payable. The accrual system wholly disregards due dates. Neither need the amount of an incurred liability be accurately ascertained in order to accrue it."

To the same effect, see *McGuire* v. *Commissioner*, 74 Fed. (2d) 729, Circuit Court of Appeals for the Second Circuit, certiorari denied.

We come then to *Floyd, Inc.*, 43 B. T. A. No. 16, Docket No. 99562, which unequivocally holds that regardless of the fact of litigation as yet unsettled in 1934, the tax under Section 104 for the year 1930, not determined until 1935, was a debt liability on December 31, 1930.

You cannot distinguish our present case from the *Floyd* case by saying that the latter arose under Section 351. The only way you can attempt to distinguish it is to attempt to distinguish between different kinds of debts for purposes of accrual. You cannot hold that interest on an unpaid tax imposed by the law at a definite rate from a fixed date is any

less an indebtedness than the tax itself. You cannot say that liability for this interest was any more conjectural, uncertain, or unsettled than liability for the tax itself. The incidence of the one equals precisely the incidence of the other.

This Board said in the *Floyd* case:

> "We are of the opinion that the Board's decision of October 9, 1935, did not as of that date create a liability or indebtedness of petitioner for income tax for the year 1930 and 1931; for the factual circumstances existing in 1930 and 1931 and the then applicable statute had already fixed petitioner's liability for those years."

I should like to insert there that the same thing as to the statute fixing liability applies to interest on unpaid taxes.

> "The deficiency notice proposed the assessment of additional taxes in a certain amount and the Board's decision redetermined the amount by applying the law to the facts as established by events which had occurred in each of the years 1930 and 1931. The petitioner's correct tax liability, as imposed by law, was ascertainable at the close of each of the years 1930 and 1931, and the controversy between the petitioner and the Commissioner as to the amount thereof"—

meaning whether Section 104 applied—

> "did not serve to postpone the time when the liability, if any, became fixed, or to cause the liability to remain contingent upon future settlement of the controversy."

The decision then says:

> "It is also settled that a liability incurred for Federal taxes constitutes a debt to the United States."

citing *Billings* v. *U. S.*, 232 U. S. 261.

On this point, as to the correct liability being immediately ascertainable by the Commissioner, I call Your Honor's attention to the fact that this Section 104 imposes upon the stockholders of the corporation the necessity of making an immediate determination, because the only "out"—to use a popular term—is Section 104(d), and if those stockholders intend to preclude the application of Section 104 to their corporation, they have to determine by the 15th of the following March whether there was any liability on the facts as they existed during the prior year.

Reverting, then, to the last part of the quotation from the Board's decision in the *Floyd* case as to its being well settled, as we all know, that a liability incurred in Federal taxes constitutes a debt to the United States, we find that under Section 292 of the Acts involved, interest upon deficiencies is so much the same debt as the tax itself that it is required to be assessed and collected at the same time and in the same manner as the deficiency, at 6 per cent from the date prescribed for the payment of the tax. How, therefore, can it be considered any the less an indebtedness, since it is specifically imposed by the statute?

If it is an indebtedness, it must have been accrued as such under the accrual system, and it certainly must be recognized as having been incurred by the end of the year following the year in which the tax was supposed to have been paid.

The solitary citation generally relied upon in opposition to our contention is *G.C.M. 9575*, X-1 C.B. 381. It rests largely, if not entirely, upon *Lucas* v. *American Code*, 280 U. S. 445, which case, however, involved litigation over an alleged breach of contract—purely a contingency. There is no analogy between that case and cases involving taxes, and the Supreme Court so states in the opinion in *Lucas* v. *American Code*. Not only that, but the *G.C.M.* includes the

motation from the Supreme Court's decision that it is entirely different from the situation in the *Anderson* case. The *G.C.M.* concludes that "as long as the indebtedness is denied and the liability to pay taxes is contested before the Bureau, the Board of Tax Appeals, or the courts, the taxpayer should not be permitted or required to accrue interest upon the disputed indebtedness (deficiency)"—and pay particular attention to this—"unless a different rule applies in the case of taxes than applies in the case of other accruable items."

It admits on its face that the Supreme Court has not indicated that its decision in the *Anderson* case is limited to the accrual of taxes alone, and it cites certain cases in which the *Anderson* case has been used to support the accrual of other accruable items.

G.C.M. rests its conclusion on the fact that the amount of interest might not be ascertainable. That certainly is upset by the cases which I have cited. That has nothing to do with the accruability of taxes. The alleged practical difficulties suggested by the *G.C.M.* as to the years that have been closed are of no importance, particularly where, as in this case, all the years which are asked for still are open.

The rule I am contending for would work both ways, and certainly the Government would not hesitate to claim that a deduction was allowable only in a year which it knew had been closed. Citations for that are not necessary, since they would fill volumes.

G.C.M. 9575, I say, has been definitely overruled by the Board and the courts in the decisions which I have cited. If Your Honor should feel otherwise, I call your attention to the fact that as a *G.M.C.* it could be revoked tomorrow, and this petitioner would have no assurance whatever that in the year or for the year in which the

present litigation finally terminates, it may find itself faced with a change by the Government for so-called "practical" reasons, or for what I would call "fiscal expedience."

Concluding, therefore, as to this item, the petitioner's position is that from the Board's findings in this case, the taxpayer was on the accrual basis; it is held liable under Section 104 for 1930, 1932 and 1933; the decisions are that this liability was an indebtedness at the close of each of those years; the due date was March 15th following each year, and on failure to pay on that date, liability for the statutory interest thereon was an indebtedness as fully as liability for the tax; that being an indebtedness on the following December 31st, it was accruable and therefore should be recognized in this computation as deductible in computing net income under Section 23(b), Section 21, and Section 104.

The Member: Do I understand that the interest that you are contending for accrued during the years 1932 and 1933 upon the deficiency for 1930 is the amount of interest which the taxpayer would have to pay if the decision of the Board for 1930 is sustained?

Mr. Grimes: I would say, which the petitioner was liable for under the decisions on December 31 of each one of the years following the due date.

The Member: Take the deficiency for 1930. The deduction you are claiming for 1932 is the interest at 6 percent for one year upon that deficiency for 1930; is that correct?

Mr. Grimes: That is correct. And for the year 1933 we include that interest for one year plus interest on the 1932 deficiency under Section 104 from March 15, 1933 to December 31, 1933. That, precisely, is correct.

There is one observation right here—it is an interpolation clearly—that I should like to make with regard to the accrual basis and a computation under Rule 50: That

if the Board in this case is limited exclusively to its findings in order to make this computation, and is unable properly to go back to the record independent of the specific findings as such, it could not make a computation, for instance, on such items as to whether the basis for the computation of the tax is a calendar year rather than a fiscal year. In this computation the Board must go back beyond the findings to certain of the exhibits. It cannot avoid it, for nowhere in the findings has this Board specifically held that a calendar year basis was involved. It is perfectly sensible that the Board should go back to the exhibits, to the returns, to find the basis from the calendar year standpoint, and it is just as sensible that it go back to those same things to find the basis upon which they were prepared, which show they were on the accrual basis. Independent of this, however, the findings of the Board show that the accrual basis was used.

The Member: I am in agreement with you on that point.

Mr. Grimes: You are in agreement, Your Honor?

The Member: Yes. Of course if it is necessary to go to the record, if the record shows the facts, the Board will go to the record to determine the correct deficiency.

Mr. Grimes: Then, Your Honor, I merely want to suggest this, that independent of the findings, the returns show that the accrual basis was used.

The Member: I think that is very clear.

Mr. Grimes: Is there any question Your Honor would like to ask there?

The Member: I think not. Under your theory you would say that in a case where the taxpayer is required to pay a deficiency in tax, where the taxpayer is on a cash basis the taxpayer would be entitled to deduct the interest paid on the deficiency?

Mr. Grimes. I don't see that there could be any ques-

tion if he was on a cash basis, since Section 23 says "interest paid on personal indebtedness."

The Member: It wouldn't make any difference if it were interest on a tax or not?

Mr. Grimes: No, I can't see any difference. Certainly interest on a refund would be income.

The Member: Yes, that is right.

Mr. Grimes: The second point which I raise is covered on pages 4 and 5 of what I would term the "Petitioner's Alternative Computation for Entry of Decision":

> "(d) In 1932 the petitioner purchased notes of individuals and corporations from the Central Manufacturing District Bank, paying therefor $501,439.58. These were carried in its balance sheet of December 31, 1932, at a value of $327,307.55. The petitioner loaned $3,071,779.19 to the Stock Yards National Bank and the Stock Yards Trust & Savings Bank. (Findings of Fact, 23.)
>
> "The Board's findings establish these disbursements, and at the time these disbursements were made it was known that huge losses would result. (Record pages 273-308.) By December 31, 1933, it was anticipated that the losses resulting therefrom would exceed five million dollars.
>
> "In accordance with the foregoing, the amounts, totaling $3,399,086.74, became deductions from gross income in 1932 under the provisions of Section 23 of the Revenue Act of 1932 and the Internal Revenue Code."

From page 5, as to the year 1933:

> "(b) In 1933 the petitioner agreed to subordinate $1,800,000 of its deposits in the Live Stock National Bank to the claims of other depositors. This was done

because the bank needed further assistance (Findings of Fact, 23).

"It was anticipated by December 31, 1933, that the losses resulting from assistance given by petitioner and its related companies would exceed five million dollars (Record, pp. 273-308). Accordingly, the amount of $1,800,000 became a deduction from gross income in 1933 under the provisions of Section 23 of the Revenue Act of 1932."

How are these shown by the Board's findings? Finding No. 23 gives the details as to the specific amounts, the particular companies that were involved, the years in which the advances were made or the disbursements were paid, and the underlying reasons therefor, at least in the mind of Mr. Prince. "Mr. Prince believed that it was necessary to protect these banks, etc."

Incidentally, the total amount covered by Finding No. 23 is, very roughly, eleven millions of dollars on the advancements, disbursements, that were made on account of these banks. The very striking fact is that under the computations the total amount of income of all these companies was only six millions of dollars for the same period.

Finding No. 25 covers the balance sheets of petitioner for the years 1930 to 1933, as revised to reflect the correct earned surplus. This finding shows "Advances to banks $3,071,779.19" as an asset in 1932. I call your attention that for 1933 the Board's finding is that asset had entirely disappeared, without any offset on the rest of the balance sheet.

Finding No. 48, which is the blanket finding, Exhibit S-52, page 6, also shows this fact, but very much more in detail.

Now, Your Honor, as to this item—and particularly because the Board recognizes that, in order to make a

correct computation and to do justice, it may go back to the record on which the findings are based—the petitioner feels that the Board very properly, and independent of any finding as to the existence of a purpose to evade surtaxes, should, in justice, go back if necessary and hold that these disbursements made on account of the banks—the record showing clearly that there was a loss at the end of 1933 in excess of five millions of dollars—the Board should allow in a computation of the liability the various items claimed as losses realized by the corporation under Section 23.

The Member: You predicate that claim on the testimony that it was anticipated there would eventually be a loss of five million dollars in connection with those investments?

Mr. Grimes: The record shows, somewhere between pages 273 and 308, that by December 31, 1933, it was anticipated that the total loss would exceed five millions of dollars, and that at the time of the trial it appeared that that anticipation was justified.

We ask, therefore, that both of these items be accepted by the Board as perfectly proper and timely in making its recomputation under Rule 50.

Thank Your Honor for your patience.

The Member: Mr. Transue.

STATEMENT ON BEHALF OF THE RESPONDENT.

Mr. Transue: If Your Honor please, I think the petitioner has lost sight of the nature of these proceedings. It was my understanding that this hearing came before the Board this morning under Rule 50 of the Board's Rules of Practice. Under that rule the parties have been directed to prepare computations of the deficiencies, which com-

putations were to be made pursuant to the Board's decision of March 20, 1940, as subsequently modified.

On April 5, 1940, the respondent submitted a recomputation pursuant to the Board's order of March 20, 1940. Within thirty days after March 20, the petitioner had filed three separate motions for rehearing. These motions were decided a few weeks ago, and the Board again set down the case for hearing under Rule 50, at which time the parties were directed to submit such computations as necessary to give effect to the opinion of the Board.

The modifications to the Board's decision made subsequent to March 20, 1940, do not necessitate the filing of new recomputations. The respondent relies on his recomputation filed April 5, 1940.

The petitioner, within the last few days, has filed alternative recomputations.

The question now awaiting decision is whether the respondent's computation conforms to the decision of the Board, or whether petitioner's computation conforms to the decision of the Board.

I find, upon looking at petitioner's recomputation, that it differs in three respects from respondent's. The first difference is with regard to the deduction of interest in the years 1932 and 1933. Then there is the question of deductibility of bank losses; and depending on those two questions, there is the question of the right to carry over losses from a preceding year.

On March 1, 1941, the petitioner filed a motion for special rule, which is in the nature of a motion for rehearing, requesting leave to raise a new issue. On March 4, 1941, another motion of similar tenor was filed by petitioner. Both motions were denied on March 7, 1941.

The statement has been made that it is the duty of the Board to determine the tax liability. I submit the Board

is not a review division of the Bureau. It is merely necessary for the Board to adjudicate such issues as are submitted to it under the Rules of Practice.

The decision of the Board in this case was originally promulgated March 20, 1940. These motions were filed almost 12 months thereafter. Under the Board's Rules of Practice a motion must be filed within thirty days after entry of decision or report. This is a belated attempt to raise a new issue.

I can find nothing in the Board's opinion promulgated March 20, 1940, as subsequently amended, which justifies any of the deductions asked for by petitioner in its recomputations. I submit that the recomputation submitted by respondent on April 5, 1940, correctly reflects the opinion of the Board and should be adopted by the Board for entry of its decision.

The Member: What is inconsistent with Mr. Grimes' contention here that this interest he is claiming as a deduction from gross income should be allowed?

Mr. Transue: It is contrary to respondent's position in regard to items of this nature. The respondent has indicated its position by *G.M.C. 9575*.

The Member: Of course the Board's opinion merely went to the question of whether this taxpayer was subject to the penalty tax of 50 percent on net income. I didn't pass on the net income. There were many adjustments made by stipulation to that net income. The only decision made by the Board is that the taxpayer is subject to this 50 percent addition to the tax upon that income, whatever that may be; the Board didn't determine that income.

Mr. Transue: That was agreed upon by the parties. The Board did not determine income because there was no issue necessitating such determination.

The Member: I am not clear wherein the contention

made by Mr. Grimes this morning on the interest question is contrary to the opinion of the Board. I am in every grave doubt, as to whether the taxpayer is not entitled to deduct that interest.

Mr. Transue: There is no issue before the Board requiring the determination of that issue. Respondent would have to be heard on that issue, and the Board would have to render a further decision.

The Member: If this case is on all fours with the *Floyd* case referred to by petitioner——

Mr. Transue (Interposing): The question there was whether the liability for the tax related back to a previous year; and it was likewise held in the *Continental Baking* case. However, nothing is said in either of those cases in regard to interest.

G.M.C. 9575 was promulgated ten years ago. The Commissioner has been operating under it ever since. The Commissioner says until the controversy is finally disposed of no interest on a deficiency may be accrued.

The Member: Is it your position that the total amount of interest that the petitioner may have to pay would all accrue within the year when the court determines the issue?

Mr. Transue: That is correct; whether it is 1945 or 1950 or whenever it is the controversy is disposed of, we would allow an interest deduction at that time.

The Member: And that it would not accrue year by year?

Mr. Transue: That is correct. At the present time neither one of us knows whether the Board is going to be sustained in this case. It may be that the First Circuit, to which I understand an appeal will be taken, will reverse the Board. It may be years before this controversy is disposed of.

It happens in this particular case all the intervening years are open, and that an adjustment can be made; but to come along with a proposition of this nature at this time is going

to make an upheaval in the rules of practice of the Bureau. This is the way we have been proceeding for years, and I don't think it is an issue before the Board. It was attempted to be raised in petitioner's motion of March 1, 1941, which was denied March 7, 1941.

There is nothing in the opinion regarding interest on this deficiency.

The Member: Your position is that there couldn't be any accrual of interest upon this item until the issue had been finally determined on the tax?

Mr. Transue: That is our position in all cases wherein that issue is present. In this particular case, it is my position that the issue is not before the Board. We would have to be given an opportunity to file briefs, and the Board would have to make a supplemental opinion.

The Member: Any further statement?

Mr. Grimes: If Your Honor please, I merely want to say that for convenience we shall submit to you printed copies of this, if you wish to have it for review.

I don't see that it is necessary to comment again on Mr. Transue's statement, except that when he says there was no issue before the Board on recomputation of net income, he is mistaken, because there were certain losses that were allowed either by stipulation or the Board's findings. There were two instances of that.

The question of inconvenience is one that needs no argument. If the law makes certain changes, obviously convenience must be subjected to the law.

The Member: I want a copy of the transcript. Did you say you would have the transcript printed?

Mr. Grimes: Yes, Your Honor.

Mr. Transue: I am sorry if I made any erroneous statement. I wasn't in the case before.

The Member: I don't think the income was stipulated.

There were certain adjustments made. I didn't fully appreciate your point, Mr. Transue, that there couldn't be any accrual of interest in this case until the court finally determined the tax.

FURTHER STATEMENT ON BEHALF OF PETITIONER.

Mr. Keeney: May I make one statement along that line?

The Member: Certainly.

Mr. Keeney: The question that Your Honor asked is really the vital question to the petitioner in this proceeding. It can readily be seen that the amount of interest becomes a very large amount. The petitioner is also probably subject to personal holding company tax. If the Government should take one position in settling this tax, and then in a later year reverse its position—that is, for instance, if the petitioner relied on the deduction coming all in one year, and then should be told that it was not in accordance with the statutes—it would result in a very large tax in that year.

Whichever way it is settled, speaking broadly, doesn't make so much difference. The petitioner is, however, entitled to have it determined that one method shall not be used in this case and another method when it starts to use the deduction.

The Member: I see that point.

(Whereupon, at 12:05 o'clock p. m., the hearing in the above entitled matter was adjourned.)

[Title omitted.]

DECISION.

[Entered March 29, 1941.]

Pursuant to the Board's findings of fact and opinion in the above-entitled proceeding promulgated March 20, 1940, 41 B. T. A. 590, the respondent, on April 5, 1940, filed his computation for entry of decision. On March 6, 1941, counsel for the petitioner filed two alternative computations for entry of decision. The respondent's computation is found to be in accordance with the Board's findings of fact and opinion. See Memorandum Sur Decision attached. Wherefore, it is ordered and decided that there are deficiencies in tax under section 104 of the Revenue Acts of 1928 and 1932, as follows:

1930	$1,817,686.10
1932	1,145,322.68
1933	1,147,111.92
Total	$4,110,120.70

Copies served on both parties.

CHARLES P. SMITH, *Member.*

[SEAL.]

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 83797.

CHICAGO STOCK YARDS COMPANY,
PETITIONER,
v.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

JOSEPH N. WELCH, ESQ., EDWARD J. KEELAN, JR., ESQ., LAWRENCE E. GREEN, ESQ., JOSEPH K. MOYER, ESQ., and FRANCIS B. KEENEY, ESQ., for the petitioner.

PHILIP M. CLARK, ESQ., and STANLEY B. PIERSON, ESQ., for the respondent.

MEMORANDUM SUR DECISION.

[Entered March 29, 1941.]

SMITH: The petitioner disputes the correctness of the respondent's computation of deficiencies in tax for the years 1930, 1932, and 1933, and has filed two alternative computations for entry of decision.

The parties are in agreement as to the deficiency for 1930. In one of its alternative computations the petitioner contends that the deficiencies for 1932 and 1933 should be in the amounts of $1,081,788.93 and $1,053,711.41, respectively, instead of the amounts claimed by the respondent. The reductions in the deficiencies found by the respondent are due to the fact that the petitioner claims the right to deduct from the gross income of 1932, upon which the tax is computed, accrued interest for one year upon the deficiency for 1930, or $109,061.17, and for 1933 accrued interest in the amount of $160,586.92, composed of $109,061.17 representing one year's accrued interest upon the deficiency of 1930, and $51,525.75 accrued interest on the deficiency for 1932 computed at six percent per annum upon $1,081,788.93 for nine months, sixteen days from March 15 to December 31, 1933. (Correct computation of interest is $51,565.27.)

By its second alternative computation the petitioner contends that there are no deficiencies for the years 1932 and 1933 but overassessments for those years of $13,496.47 and $12,963.21, which are the amounts of tax shown to be due by the original returns. In this computation the petitioner claims the right to deduct from the gross income of 1932 accrued interest on the deficiency for 1930 of $109,061.17 and losses as follows:

(d) Amount ($327,307.55) paid to Central Manufacturing District Bank for notes of individuals and corporations; and Amount ($3,071,779.19) advanced to Stock Yards National Bank and Stock Yards Trust & Savings Bank	$3,399,086.74

Petitioner's computation thus results in a net loss for 1932 of $3,442,670.38. For 1933 the petitioner claims the deduction of $109,061.17 accrued interest on the deficiency for 1930, a loss of $1,800,000 representing "subordination of petitioner's deposits in the Live Stock National Bank," and a net loss carry-over from 1932 under section 117 of the Revenue Act of 1932 of $3,442,670.38. In this manner it computes a net loss for 1933.

This proceeding was submitted to the Board solely upon the question as to whether in 1930, 1932, and 1933 the petitioner was taxable under section 104 of the Revenue Acts of 1928 and 1932. The parties are fully in agreement as to the net income of the petitioner for each of the years involved. The petitioner by its alternate computations seeks to raise new issues involving the correct net income of the petitioner for each of the years 1932 and 1933. New issues may not be considered under Rule 50 of the Board's Rules of Practice. See *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308.

The respondent's computation is in accordance with the Board's findings of fact and opinion.

[Title omitted.]

MOTION TO FIX SUM OF BOND ON APPEAL.

[Filed June 13, 1941.]

Now comes the petitioner in the above-entitled action and moves that the Board fix the sum of the bond on appeal to the Circuit Court of Appeals at $6,919,300, said sum having been arrived at as follows:

1930 Deficiency	$1,817,686.10
Interest thereon from March 15, 1931 to December 28, 1943	1,394,414.24
1932 Deficiency	1,145,322.68
Interest thereon from March 15, 1933 to December 28, 1943	741,180.67
1933 Deficiency	1,147,111.92
Interest thereon from March 15, 1934 to December 28, 1943	673,511.84
Grand Total	$6,919,227.45

CHICAGO STOCK YARDS COMPANY,
Petitioner.
By J. N. Welch, Its attorney.

[Title omitted.]

ORDER FIXING AMOUNT OF BOND.

[Dated June 13, 1941.]

Upon application of the above-named petitioner to fix the amount of the bond on appeal to the United States Circuit Court of Appeals, it is ordered that the said bond be and the same hereby is fixed in the amount of $6,919,300.00.

CHARLES P. SMITH, *Member.*

[SEAL.]

[Title omitted.]

PETITION FOR REVIEW.

[Filed June 27, 1941.]

To the Honorable Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes the Chicago Stock Yards Company, a Maine corporation, and petitions for review of the decision of the United States Board of Tax Appeals entered on March 29, 1941 in the above-entitled proceeding and says:

1. The nature of the controversy is as follows:

This is a Federal income tax case involving the income of a domestic corporation for the calender years 1930, 1932 and 1933.

One issue is whether the petitioner is subject to taxation for each of said calendar years under Section 104 of the Revenue Acts of 1928 and 1932. Section 104 is the section entitled "Accumulation of Surplus to Evade Surtaxes." The Commissioner determined that the petitioner was subject to taxation under that section for each of the years 1930, 1932 and 1933; and the Board of Tax Appeals in its said decision decided,

"That there are deficiencies in tax under section 104 of the Revenue Acts of 1928 and 1932, as follows:

1930	$1,817,686.10
1932	1,145,322.68
1933	1,147,111.92
Total	$4,110,120.70"

The other issue relates to a deduction for interest for the year 1932 upon any deficiency found in this action for the year 1930; and to a deduction for interest for the year 1933 upon any deficiency found in this action for the years

1930 and 1932. The petitioner kept its books of accounts and filed its income tax on the accrual basis. If in this action it is determined that there was a deficiency in income tax for 1930, then during 1932 and 1933 interest accrued upon such deficiency; and if it is determined that there was a deficiency in income tax for 1932, then during 1933 interest accrued upon such deficiency. After the trial of the above action before the Board of Tax Appeals and after the Board promulgated its findings of fact and opinion indicating deficiencies for 1930, 1932 and 1933, but before decision was entered by the Board, the petitioner by Motion for Special Rule filed March 1, 1941 and by Petitioner's Computation for Entry of Decision filed March 6, 1941, petitioned the Board to allow as a deduction in computing its net income for 1932 interest accrued during 1932 on any deficiency for 1930, and as a deduction in computing its net income for 1933 interest accrued during 1933 on any deficiency for 1930 and 1932. The Board declined to allow such deduction.

2. The party seeking review is the petitioner, the Chicago Stock Yards Company, a Maine corporation.

3. The petitioner made its return of the tax in respect of which the liability involved in this action arises to the Collector of Internal Revenue for the Massachusetts District whose office is located in the City of Boston, Massachusetts, within the circuit of the United States Circuit Court of Appeals for the First Circuit.

WHEREFORE, the petitioner prays that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action

be taken, to the end that the errors complained of may be reviewed and corrected by said Court.

/s/ J. N. WELCH,
/s/ FRANCIS B. KEENEY,
Attorneys for Petitioner on Review.

[Title omitted.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing [typewritten] pages, 1 to 1652, inclusive [printed pages 1 to 1243, inclusive] contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 27th day of October, 1941.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[SEAL.]

[MEMORANDUM. Orders of enlargement of time for docketing case to, and including, December 31, 1941, are here omitted. A. I. CHARRON, *Clerk.*]

[Title omitted.]

NOTICE OF FILING PETITION FOR REVIEW AND STATEMENT OF POINTS.

[Filed June 27, 1941.]

To:

You are hereby notified that Chicago Stock Yards Company did, on the 27th day of June, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit, of the decision of the Board heretofore rendered in the above entitled case. Copies of the petition for review and the statement of points as filed are hereto attached and served upon you.

Dated this 27th day of June, 1941.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Service of copy of Petition for Review and Statement of Points acknowledged this 27th day of June, 1941.

J. P. WENCHEL,
Attorney for Respondent.

[Title omitted.]

STATEMENT OF POINTS.

[Filed June 27, 1941.]

Now comes the petitioner on review in the above-entitled proceeding and says that the following is a concise statement of points upon which it intends to rely on appeal.

The United States Board of Tax Appeals erred:

1. By the finding and ruling contained in said Findings of Fact (Finding #44) and Opinion (41 B.T.A. 590, at pages 612, 624) that the petitioner during the years 1930, 1932, and 1933 was a mere holding or investment company; and by relying upon said finding and ruling as a ground for its decision.

2. By the finding and ruling contained in said Findings of Fact (Finding #45) and Opinion (41 B.T.A. at pages 612, 624) that the petitioner during the years 1930, 1932, and 1933 permitted its gains and profits to accumulate beyond the reasonable needs of its business; and by relying upon said finding and ruling as a ground for its decision.

3. By the finding and ruling contained in said Findings of Fact (Finding #46) and Opinion (41 B.T.A. at page 612) that the petitioner during the years 1930, 1932, and 1933 was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed; and by relying upon said finding and ruling as a ground for its decision.

4. By the ruling contained in its said Opinion (41 B.T.A. at page 618) as follows:

> "As a holding company, the petitioner had no need for the accumulation of gains and profits."

and by relying upon said ruling as a ground for its decision.

5. By the ruling contained in its said Opinion (41 B.T.A. at page 618) as follows:

> "But even as a management company, we cannot see that the petitioner had need for the accumulation of a large surplus."

and by relying upon said ruling as a ground for its decision.

6. By the finding and ruling contained in its said Opinion (41 B.T.A. at page 620) as follows:

> "But the Jersey Co. is amply able to take care of both its own bonded indebtedness, and that of the Elevated Co."

and by relying upon said finding and ruling as a ground for its decision.

7. By the finding and ruling contained in its said Opinion (41 B.T.A. at pages 623, 624) as follows:

> "Although Prince testified that under his program it was contemplated that the Jersey Co. would be liquidated in 1940, there appears to be no necessity for its liquidation and many reasons why it probably will not be liquidated. When the petitioner was organized in 1911, an issue of $14,000,000 bonds was provided for. The petitioner covenanted with the trustee that it would do all that was necessary for it to do to continue the existence of the Jersey Co. The outstanding bonds of the petitioner are callable at 105, but if they are not called and paid off the petitioner is under obligation to continue the existence of the Jersey Co.
>
> "McDonough, petitioner's vice president, testified that either he or Prince had consulted counsel as to

the possibility of obtaining an extension or renewal of the Jersey Co.'s charter. Counsel advised that such an extension or renewal could undoubtedly be obtained under the New Jersey statutes. They simply require a consent of two-thirds of each class of stock of the old corporation. It is inconceivable that the petitioner can not obtain such a consent. It owns more than two-thirds of the common shares, and the preferred shares bearing a 6 percent dividend are well secured by assets and earnings.

"Upon a liquidation of the Jersey Co. in 1940 the petitioner would apparently be subject to heavy income taxes; for its investment in the common and preferred shares and in the bonds of the Jersey Co. and its subsidiaries would amount to not more than $35,000,000 and the assets acquired would apparently have a value, based upon cost, book values, and earnings, of more than $60,000,000. Although it may be desirable to merge or consolidate the petitioner and the Jersey Co. it seems doubtful whether the Jersey Co. will be liquidated in 1940."

and by relying upon the foregoing finding and ruling as a ground for its decision.

8. By failing to find as a fact in substance the following upon which the testimony introduced by witnesses for both parties was undisputed:

"At all material times it was sound business policy for the petitioner to plan to liquidate the Jersey Company in 1940."

9. By failing to find as a fact in substance the following: "The purpose of the petitioner in accumulating earnings during the years 1930 to 1933, inclusive, as well as prior thereto, was to acquire sufficient liquid

assets to purchase all Jersey Company common stock that could be purchased before 1940 at a reasonable price, to pay off all of the bonds of the petitioner and of the Jersey Company and of its subsidiaries by 1940, and to pay off all the outstanding preferred stock of the Jersey Company in 1940.

"This plan, as at the close of the year 1929, contemplated an accumulation of cash and liquid assets in the treasury of the petitioner, its subsidiary, Produce Terminal, and the Jersey Company and its subsidiaries, of approximately $36,000,000 divided as follows:

Total bonded indebtedness	$23,963,000.00
Preferred stock Jersey Co. (64,543 shares)	6,454,300.00
Common stock Jersey Co. (6,258 shares)	1,034,134.50
Working capital	5,000,000.00
Total	$36,451,434.50

The foregoing figures appear in the Board's Opinion (41 B.T.A. at page 619).

10. By the ruling contained in its said Opinion (41 B.T.A. at page 618) as follows:

"We do not see either that the petitioner had any need of an accumulation of gains and profits for the purpose of financing other corporations. It was not obligated on the principal of any bonds other than its own which were outstanding at December 31, 1929, in the amount of $3,227,000."

and by relying upon said ruling as a ground for its decision.

11. By the finding and ruling contained in its said Opinion (41 B.T.A. at page 618) as follows:

"The evidence shows the manner in which the petitioner has used its earnings from the date of incorporation. It has been free to use them in any manner it saw fit. It has used a large part of them in the purchase of shares of stock of the Jersey Co. The next most important item is loans made to Prince. During the years 1930 to 1933 the petitioner loaned $1,625,000 to District and $236,536.51 to the Pau Corporation. It had no financial interest in the latter. The necessity for these loans, if any existed, is not shown."

and by relying upon said finding and ruling as a ground for its decision.

12. By the finding and ruling contained in its said Opinion (41 B.T.A. at page 618) as follows:

"Certainly there is no indication of the need for any further accumulation in the years 1930, 1932, and 1933."

and by relying upon said finding and ruling as a ground for its decision.

13. By the finding and ruling contained in its said Opinion (41 B.T.A. at page 619) as follows:

"The plan as at the close of the year 1929 contemplated an accumulation of cash and liquid assets in the treasury of the petitioner, its subsidiary, Produce Terminal, and the Jersey Co. and its subsidiaries of approximately $36,000,000, divided as follows:

Total bonded indebtedness	$23,963,000.00
Preferred stock Jersey Company (64,543 shares)	6,454,300.00
Common stock Jersey Company (6,258 shares)	1,034,134.50
Working capital	5,000,000.00
Total	$36,451,434.50

The bonds and debenture notes of the petitioner and the Jersey Co. and its subsidiaries outstanding on December 31, 1929, were as follows:

Petitioner	
5% bonds maturing 1961	$ 3,227,000
Jersey Co.	
5% bonds maturing April 1, 1940	10,000,000
4% bonds maturing April 1, 1940	4,000,000
Transit Co.	
Debenture notes maturing 1930	500,000
Elevated Co.	
4% bonds maturing March 1, 1945	2,327,000
District maturing various dates to 1941	3,909,000
Total	$23,963,000

We do not think that an accumulation of surplus for the purposes above indicated was within the reasonable needs of the petitioner's business."

and by relying upon said finding and ruling as a ground for its decision.

14. By the finding and ruling contained in its said Opinion (41 B.T.A. at pages 619, 620) as follows:

"Clearly, there was no reasonable need for the petitioner to acquire the balance of the common stock and the outstanding preferred shares of the Jersey Co."

and by relying upon said finding and ruling as a ground for its decision.

15. By the finding and ruling contained in said Opinion (41 B.T.A. at page 621) as follows:

"In the proceeding at bar we do not think that the evidence shows a reasonable need of the petitioner for any further accumulation of gains and profits during any of the years 1930, 1932 and 1933."

and by relying upon said finding and ruling as a ground for its decision.

16. By failing to find as a fact the substance of the following:

> "Mr. Prince and the others in authority here had an expectation all during the years 1920 to 1933 inclusive, to liquidate the Jersey Company. The Maine Corporation did not have any purpose except the purpose of Prince, and the corporation can't have a purpose except the purpose of its officers or directors, and it is plain that it was Mr. Prince's idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares, to pay off not only all of the bonds of the Jersey Company in or before 1940 but all of the indebtedness of all of the other corporations."

17. By failing to find as a part of Finding #34 (41 B.T.A. at page 610) of said Findings of Fact as supplemented by order of the Board dated January 24, 1941 the following:

> "The total of the sale price of such of said securities as were sold by the petitioner and the market value of such as were held by it at the time of the trial exceeded the cost to the petitioner by a substantial amount."

18. By denying the petitioner's Motion for Rehearing and Further Hearing filed April 19, 1940 and by refusing to admit in evidence the evidence sought to be introduced in said motion and contained in an affidavit of James A. McDonough and a further affidavit of James A. McDonough filed in support of said notice.

19. By the following ruling contained in its said Opinion (41 B.T.A. at page 621):

"Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose. The bare recital of the undisputed facts relating to the organization of the petitioner, the balance sheets, the source of earnings, the nature of the investments, the large accumulations of cash and surplus, the loans of cash and securities to the petitioner's sole stockholder, and the continued reinvestment of its gains and profits in securities, present, in our opinion, a situation typical of situations which Congress intended to cover by section 104 of the Revenue Acts of 1928 and 1932."

and by relying upon said ruling as a ground for its decision.

20. By the following ruling contained in its said Opinion (41 B.T.A. at page 621):

"It should be borne in mind that the petitioner was solely owned by Prince from 1922 to June 1, 1932, and, for all practicable purposes, thereafter. The petitioner was the *alter ego* of Prince. It was Prince in corporate clothes. It was of no moment to Prince whether the earnings of the petitioner were carried in his individual pocketbook or in his corporate pocketbook, except that if they had been received in the first instance in his individual pocketbook or distributed to him by the petitioner he would have been subjected to heavy surtaxes upon them, while he avoided such surtaxes by retaining them in the corporation. The situation is analogous to that which obtained in *Helvering* v. *National Grocery Co., supra*, where an operating company organized in 1908 had accumulated a surplus of approximately $8,000,000 and had cash and securities on hand aggregating approximately $4,250,000, which represented four-fifths of the total accumulation of surplus profits during the last ten years."

and by relying upon said ruling as a ground for its decision.

21. By the following ruling contained in its said Opinion (41 B.T.A. at page 622):

> "The evidence shows that the petitioner was availed of by Prince for the purpose of reducing his own tax liabilities. Over a number of years Prince had accumulated more than 17,000 shares of Jersey Co. common stock upon which he was receiving an annual dividend of $9 per share. These were his own shares of stock. The dividends on them were taxable to him. In 1918 he transferred all of those shares of stock to the petitioner at cost and was thereafter relieved from the payment of surtax upon the dividends thereon."

and by relying upon said ruling as a ground for its decision.

22. By the ruling contained in said Opinion (41 B.T.A. at page 624) that the petitioner had failed to show on all the evidence that such gains and profits as were accumulated during the years 1930, 1932 and 1933 were not for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed.

23. By failing to find as a fact to be added to Finding #23 of said Findings of Fact the following:

> "At the time the transactions herein set forth were entered into, the petitioner anticipated that such transactions would result in a substantial loss to each of the companies participating in these transactions. By December 31, 1933, it was anticipated that the total loss would exceed $5,000,000; and at the time of trial it appeared that this anticipation was justified."

24. By the ruling contained in said Opinion that, in the absence of any express determination by the Commissioner

that the petitioner was a mere holding or investment company, there was any presumption that the corporation was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

25. By the ruling contained in said Opinion that (even if the Board were correct in its ruling that the petitioner was a mere holding or investment company and that such determination raises a statutory presumption that the corporation was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed) such presumption casts upon the petitioner any burden other than that of going forward with the evidence; and by failing to rule that the petitioner has gone forward with the evidence so that any such presumption as may have existed has disappeared from the case.

26. By the ruling contained in said Opinion that in the absence of any express finding by the Commissioner that the gains or profits of the petitioner were permitted to accumulate beyond the reasonable needs of the business, that there was any presumption that the corporation was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

27. By the ruling contained in said Opinion that (even if the Board were correct in its ruling that the gains or profits of the petitioner were permitted to accumulate beyond the reasonable needs of the business and that such determination raises a statutory presumption that the corporation was availed of for the purpose of preventing the

imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed) such presumption casts upon the petitioner any burden other than that of going forward with the evidence; and by failing to hold that the petitioner has gone forward with the evidence, so that any such presumption as may have existed has disappeared from the case.

28. By the ruling contained in said Opinion that the burden was upon the petitioner of establishing by a preponderance of evidence that the corporation was not availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

29. By failing to rule that the burden was upon the Commissioner to prove that the corporation was availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

30. By finding as a fact the last paragraph contained in Finding #24 (41 B.T.A. at page 601) of said Findings of Fact and by relying upon said finding as a ground for its decision.

31. By failing to find the following facts in lieu of the last paragraph in Finding #24 (41 B.T.A. at page 601) of said Findings of Fact:

> "The loans which the petitioner made to Prince were consistently used by him and his brokerage concern to buy securities of the stockyards corporations in which the petitioner had an interest or to restore to his brokerage firm money which had been expended by it in acquiring such securities, with the exception of one

sum of $160,000 which Prince borrowed from the petitioner in 1932 for a short period to finance the purchase of his Newport house until he could sell his North Shore place. The securities which the petitioner loaned to Prince were used by him as collateral to secure loans from banks for the purchase of securities of such stockyards corporations. In 1933 the petitioner loaned an amount of approximately $1,000,000 to Prince to enable him to acquire shares of stock of Armour & Co. common A and B shares and preferred stock at a cost to him of $1,067,389.50. With this acquisition of stock of Armour & Co., Prince became chairman of the Board of Directors of Armour & Co. In 1930 the loans of cash and securities actually decreased by $916,250. Over the four years, 1930-1933, the net amount of cash and securities loaned by the petitioner to Prince was $886,670. Included in this was the loan in 1933 of $1,000,000, which Prince used in the purchase for $1,067,389.50 of the Armour shares. This purchase was made to acquire control of the Armour stock so that the profitable Armour business would be kept in the stockyards enterprise."

32. By denying petitioner's Motion for Special Rule filed March 1, 1941 and by failing to allow as a deduction from net income in computing any deficiency for 1932 interest accruing during the year 1932 upon any deficiency found in this action for the year 1930 and interest accruing during 1933 for any deficiency found in this action for the years 1930 and 1932.

33. By finding and ruling that the petitioner was subject to taxation for 1930 under section 104 of the Revenue Act of 1928.

34. By finding and ruling that the petitioner was sub-

ject to taxation for 1932 under section 104 of the Revenue Act of 1932.

35. By finding and ruling that the petitioner was subject to taxation for 1933 under section 104 of the Revenue Act of 1932.

36. The Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to law.

J. N. WELCH,
FRANCIS B. KEENEY,
Attorneys for Petitioner on Review.

[Title omitted.]

DESIGNATION OF CONTENTS OF RECORD TO BE CONTAINED IN THE RECORD ON APPEAL.

[Filed July 23, 1941.]

Now comes the petitioner on review in the above-entitled proceeding and designates for inclusion in the record on appeal the complete record and all the proceedings and evidence taken in the action.

J. N. WELCH,
FRANCIS B. KEENEY,
Attorneys for Petitioner on Review.

[Title omitted.]

ORDER OF COURT.

August 12, 1941.

[Filed Aug. 14, 1941.]

Upon motion of petitioner for review, It is ordered that the original exhibits in this case be transmitted to this court as physical exhibits in lieu of reproduction thereof in the printed record on review to be treated as part of said record for reference thereto by the Court and by counsel with the same effect as though reproduced in the printed record; said exhibits, however, shall remain in the custody of the Board of Tax Appeals until ten days before the first day of the session in which this case shall be assigned for argument.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

[SEAL.]

A true copy.

Attest: ARTHUR I. CHARRON, *Clerk.*

[Title omitted.]

STIPULATION AS TO CONTENTS OF RECORD ON REVIEW.

[Filed Oct. 10, 1941.]

Now comes the parties in the above-entitled action and stipulate that the record on review shall consist of the following; it being agreed that this stipulation shall supersede the designation of contents of record filed by the petitioner on July 23, 1941, and that the record so constituted contains all the evidence received by the United States

Board of Tax Appeals at the trial and all other evidence and proceedings material to the review of the decision of the United States Board of Tax Appeals entered on March 29, 1941 in the above-entitled proceeding as prayed for by the petitioner, Chicago Stock Yards Company, in its petition for review filed June 27, 1941.

1. Copy for all docket entries.

2. Petition.

3. Amendment to petition filed May 29, 1936, and notice of deficiency dated January 27, 1936 and statement attached.

4. Answer.

5. Motion for leave to amend petition filed August 23, 1938, and amended petition.

6. Answer to amendment of petition, filed October 13, 1938.

7. Stipulation of facts (see Paragraph 32 hereof for exhibits).

8. Transcript of the proceedings at the trial before Mr. Sternhagen from January 30, 1939 to February 9, 1939, inclusive, including therein opening statements by counsel and oral argument by counsel, corrected in accordance with stipulation filed April 19, 1939.

9. Findings of fact and opinion of Board promulgated March 20, 1940.

10. Order of March 22, 1940 that findings of fact be corrected.

11. Computation of deficiency filed by general counsel April 5, 1940.

12. Motion to modify findings of fact and for additional findings of fact filed April 18, 1940.

13. Motion for further hearing filed April 18, 1940.

14. Motion for rehearing and further hearing filed April 18, 1940, and affidavit of James A. McDonough in support thereof.

15. Transcript of the proceedings before the Board on July 18, 1940, Messrs. Smith, Kern and Opper, sitting.

16. Motion and further affidavit of James A. McDonough filed July 18, 1940 and order of Board July 18, 1940 granting motion.

17. Order of Board of September 21, 1940 and memorandum sur order.

18. Transcript of the proceedings before the Board on October 1, 1940, Messrs. Smith, Kern and Opper, sitting.

19. Order supplementing Board's findings, filed January 25, 1941.

20. Order that parties file recomputations of deficiencies filed February 11, 1941.

21. Motion for special rule filed March 1, 1941.

22. Petitioner's computation for entry of decision filed March 6, 1941.

23. Order denying motions filed March 7, 1941.

24. Transcript of the proceedings before the Board on March 12, 1941, Mr. Smith, sitting.

25. Decision of Board of March 20, 1941 and memorandum sur decision.

26. Motion to fix the amount of bond filed June 13, 1941.

27. Order of June 13, 1941 fixing the amount of the bond.

28. Petition for review filed June 27, 1941.

29. Statement of points filed June 27, 1941.

30. Designation of contents of record filed July 23, 1941.

31. Order of court in re exhibits dated August 12, 1941.

32. Original exhibits numbered S-1 to S-69, inclusive, attached to the stipulation filed at the trial to be filed with the Clerk of the Circuit Court of Appeals for the First Circuit in original form in accordance with order of that Court.

33. Petitioner's original exhibits numbered 1 to 48, in

peals for the First Circuit in original form in accordance with order of that Court.

34. Respondent's original exhibits numbered A to YYYY, inclusive, to be filed with the Clerk of the Circuit Court of Appeals for the First Circuit in original form in accordance with order of that Court.

35. Order of the Board entered August 1, 1941 enlarging time. Not included in record.

36. Order of court enlarging time dated August 12, 1941. Not included in record.

37. This stipulation as to contents of record on review.

CHICAGO STOCK YARDS COMPANY
By J. N. WELCH,
LAWRENCE E. GREEN.

COMMISSIONER OF INTERNAL REVENUE
By J. P. WENCHEL,
Attorney for Respondent.